In The

# Supreme Court of the United States

October Term, 1997

JEFFERSON COUNTY, ALABAMA,

*Petitioner,*

v.

WILLIAM ACKER and U. W. CLEMON,

*Respondents.*

**On Petition For Writ Of Certiorari To The Eleventh Circuit Court Of Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the absence of the United States Government as a party forecloses the judicial exception to the Tax Injunction Act resulting in no federal jurisdiction.

II. Whether a County privilege/occupational tax levied upon the income of an Article III judge is a direct tax on the United States in violation of the Supremacy Clause.

## PARTIES TO THE PROCEEDINGS BELOW AND CERTIFICATE OF INTERESTED PERSONS

| | |
|---|---|
| Petitioner | Jefferson County, Alabama. |
| Petitioner's Counsel | Edwin A. Strickland<br>Jeffrey M. Sewell |
| Respondents | William Acker<br>U. W. Clemon |
| Respondents' Counsel | Irwin Stolz<br>Seaton Purdhom |
| Trial Judge | Honorable Charles A. Moye, Jr., Senior United States District Judge |
| En Banc Eleventh Circuit Court of Appeals | Hon. Gerald Bard Tjoflat<br>Hon. Phyllis A. Kravitch<br>Hon. Joseph W. Hatchett<br>Hon. R. Lanier Anderson, III<br>Hon. J. L. Edmondson<br>Hon. Emmett R. Cox<br>Hon. Stanley F. Birch, Jr.<br>Hon. Joel F. Dubina<br>Hon. Susan H. Black<br>Hon. Ed Carnes<br>Hon. Rosemary Barkett<br>Hon. Albert J. Henderson |

No other persons are known to have participated directly or indirectly in the appeal of this matter.



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## CITATIONS OF THE OPINIONS AND JUDGMENTS ENTERED IN THE COURTS BELOW

The opinions and judgments entered in the courts below are contained in the appendix to this brief.

## STATEMENT FOR BASIS OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. This is a petition for certiorari from an en banc decision of the United States Court of Appeals for the Eleventh Circuit.

(i) Date of en banc judgment: March 27, 1998.

(ii) No application for rehearing filed.

(iii) No cross petition filed.

(iv) Appellate Jurisdiction is conferred by 28 U.S.C. § 1254(1) and Rule 10 (a) and (c) of the Rules of the United States Supreme Court.

(v) The judgment below effectively declared the Buck Act, 4 U.S.C. § 106-110 and the Public Salary Act, 4 U.S.C. § 111 to be unconstitutional as applied to Article III judges. Neither the United States, nor any federal department, office, agency, officer or employee is a party to this case. The United States Court of Appeals did not certify to the Attorney General the fact that the constitutionality of these acts of Congress were drawn into question. Accordingly, this petition was served on the Solicitor General of the United States, Room 5614,

Department of Justice, 10th Street and Constitution Avenue, N.W., Washington, D.C. 20530.

## STATEMENT OF CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED IN THE CASE

The provisions involved are lengthy. Accordingly, only their citations are provided below. The verbatim text is contained in the appendix.

i. The supremacy clause, Article VI, United States Constitution.

ii. The Buck Act, 4 U.S.C. § 106-110.

iii. The Public Salary Act, 4 U.S.C. § 111.

iv. The Tax Injunction Act, 28 U.S.C. § 1341.

v. 5 U.S.C. § 5520.

vi. 31 CFR § 215.2.

vii. Alabama Act 406 (1967).

viii. Jefferson County, Alabama Ordinance No. 1120.

ix. The Alabama State Business License Code, §§ 40-12-1, *et seq.*, Alabama Code (1975).

## STATEMENT OF THE CASE

### (I) Nature of Case, Course of Proceedings and Disposition.

Respondents William Acker and U. W. Clemon are active duty Article III judges in the Northern District of



Alabama. They refused to pay the County's occupational tax which was authorized by Alabama Act 406 (1967) [hereafter "Act 406"] and implemented by County Ordinance 1120, effective January 1, 1988. The occupational tax is levied at the rate of one-half of one percent (.005%) of the gross receipts earned in the geographic boundary of the County by individuals who are not required to purchase a state business license pursuant to the state business license code codified at § 40-12-1 *et seq.*, Ala. Code (1975). The occupational tax is collected from hundreds of thousands of persons who work in the County.

The County filed suit against respondents in the state small claims court. Respondents removed the cases to the United States District Court for the Northern District of Alabama. The cases were consolidated and specially assigned to the Honorable Charles A. Moye, Jr., Senior District Judge, from the State of Georgia. The County timely filed a Motion to Remand asserting that federal jurisdiction was barred by the Tax Injunction Act, 28 U.S.C. § 1341. The motion was denied.

As the case involved only questions of law and since the material facts were undisputed, the case was submitted to the trial court on stipulated facts and cross motions for summary judgment. The trial court entered a final order denying the County's motion for summary judgment and granting Respondents' motion for summary judgment. The trial court held that, as applied to federal judges, the County occupational tax is a "franchise tax imposed upon the federal judiciary operations and is unconstitutional as a direct tax upon an officer and instrumentality of the United States, that is, upon the sovereign itself." 800 F.Supp. at 1545, 46. The trial court

also held that the County occupational tax "constitutes an unconstitutional diminution of the defendants' compensation and is invalid as to them." 805 F.Supp. at 1548. In effect, the trial court held that the Buck Act and Public Salary Act are unconstitutional as applied to federal judges. That is, the supremacy clause of Article VI and the compensation clause of Article III, United States Constitution, deprive Congress of the power to consent to the levy of a municipal tax on the compensation of Article III judges.

The County appealed. The case was assigned to a three judge panel of the Eleventh Circuit Court of Appeals. After briefing and oral argument the panel reversed the trial court and held the levy of the tax on Respondents' compensation did not violate the supremacy clause or the compensation clause of the United States Constitution and remanded the case for determination of the amount of tax owed. 61 F.3d 848.

The Court of Appeals granted en banc rehearing. 73 F.3d 1066. After rebriefing and oral argument, the divided[1] court of appeals held that the County tax on federal judges is a direct tax on the federal government or its instrumentalities in violation of the intergovernmental tax immunity doctrine.[2] 92 F.3d 1561.

The County then filed a petition for certiorari which was granted by this Court. This Court requested the

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[1] En banc 9 judges to 3 judges.

[2] The Court of Appeals expressly declined to address whether the County tax unconstitutionally diminishes federal judges' compensation.



United States to file an *amicus* brief. The Attorney General and Solicitor General filed an *amicus* brief urging this Court to grant the petition and reverse the Court of Appeals.[3] The Attorney General and Solicitor General also suggested that this Court examine the existence of federal jurisdiction. This Court vacated the court of appeals' decision and remanded the case for consideration of federal jurisdiction in light of this Court's holding in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 177 S.Ct. 1776 (1997). See *Jefferson County v. Acker*, ___ U.S. ___, 117 S.Ct. 2429, 138 L.Ed.2d 191 (1997).

The court of appeals has now entered a supplemental opinion holding that federal judges are instrumentalities of the United States and are entitled to utilize the judicial exception to the Tax Injunction Act notwithstanding the absence of the United States as a party. 137 F.3d 1314. Having found the existence of federal jurisdiction, the court of appeals reinstated its prior en banc opinion, this time with an additional dissenting judge. This appeal follows.

**(II) Stipulated Facts**

The undisputed material facts were stipulated by the parties as follows:

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by

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[3] The *amicus* brief is reproduced in the appendix.

state law to pay a privilege, license or occupational tax to the State of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the County, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state.

Section 2 of Jefferson County Ordinance No. 1120 provides:

> [i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging in or following such vocation, occupation, calling or profession . . .

Section 1, Definitions, subsection (C), provides:

> [t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The County Occupational Tax is measured at the rate of one-half of one percent (.005%) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.



4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintained their principal offices at the Hugo Black Federal Courthouse in the City of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, section 3, provides:

> [i]n cases where compensation is earned as a result of work done or services performed both within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of a federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the State of Alabama. Defendants, however, still pay their dues

(one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld County Occupational Tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.

11. All active judges of the Northern District of Alabama except defendants have paid the County Occupational Tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting procedure. At least one Article III judge (not a defendant) has paid "under protest".

12. All State District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the County Occupational Tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the County Occupational Tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, had chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the County Occupational Tax.



14. Since 1970, the City of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the County tax) on persons engaged in any vocation, occupation, calling or profession within the City.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the City Occupational Tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the County Occupational Tax, except that it contains no exemptions. The Gadsden ordinance provides in pertinent part:

> [i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.

Gadsden, City Code, Section 7-51.

18. The City of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division

of the Northern District of Alabama, which has its courthouse in the City of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.

**(III) No Basis for Federal Jurisdiction in the Courts Below**

The trial court exercised jurisdiction pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(3). But, the County contested the existence of federal jurisdiction for several reasons.

First, in *Mesa v. California*, 489 U.S. 1 (1989), this Court held that a federal officer may remove a case from state court if: (1) the existence of a colorable federal defense is pled to the claim and (2) the officer is being sued for an act done under color of office or in the performance of federal duties. 489 U.S. at 136. Respondents' federal defense is that the levy of the County tax on their pay violates intergovernmental tax immunity. But, that defense was abrogated by Congress in 1939 with enactment of the Public Salary Tax Act and Buck Act wherein Congress expressly consented to the levy of county occupational tax on the pay of a federal judge. Respondents plead a federal defense which does not



exist! That does not meet the first element of the *Mesa* test.

Second, pursuant to *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), the right to tax the pay or compensation of a federal employee is granted by federal law, not state law. And federal law, not state law, determines the taxable event. The Public Salary Tax Act and Buck Act render the county tax an income tax. The taxable event is the receipt of income. The receipt of income is not an "act performed under color of office" or "performed in connection with official duties". Neither their position, duties or office authorizes Respondents to avoid paying their lawful debts. It is axiomatic that their non-payment of lawful debts (i.e., their refusal to pay taxes required by federal and state law) cannot be an act done under color of office or in connection with the performance of their duties. Failing to pay their lawful debts is not an act which satisfies the second element of the *Mesa* test.

Third, even if federal officer removal jurisdiction could be established, it is extinguished by the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341. The TIA prohibits federal courts from interfering with the assessment and collection of a state tax if the state provides a plain, speedy and efficient remedy. It is undisputed that Alabama Courts provide Respondents with such a remedy. *See Richards v. Jefferson County*, 789 F. Supp. 369, 371 (N.D. Ala. 1992), *affirmed* 938 F.2d 237 (11th Cir. 1992) (finding Alabama's remedies adequate for Tax Injunction Act purposes in a class action challenging the same County occupational tax). Therefore, respondents do not fit within the statutory exception to the TIA.

And, respondents do not fit within the judicial exception to the TIA created by this Court in *Dep't of Employment v. United States*, 385 U.S. 355 (1966) and clarified in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 117 S.Ct. 1776 (1997) (holding that in order for federal instrumentality to utilize judicial exception to TIA the United States must be a party). The United States Government refused to become a party in this case. Instead, when this case was last before this Court, the Attorney General and Solicitor General filed an *amicus* brief supporting the County and urging this Court to reverse the court of appeals. *See amicus* brief of United States in appendix. This Court vacated the court of appeals' decision and remanded the case for consideration of the jurisdictional issue. On remand the court of appeals refused to follow *Arkansas v. Farm Credit Services* and instead concluded that the judicial exception to the TIA applied even where the United States was not a party. The court of appeals' holding appears to be in direct conflict with this Court's holding in *Arkansas v. Farm Credit Services*. It is also in direct conflict with a decision from another court of appeal which holds that the United States Government must be a party. *Housing Authority of Seattle v. Washington Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir. 1980).

## ARGUMENT ON THE MERITS

### This is a case of FIRST IMPRESSION

In this case a divided court of appeals immunized Article III judges from a County occupational tax paid by hundreds of thousands of persons who work in Jefferson



County, Alabama, including state Supreme Court justices and all state trial court judges. The court of appeals held that federal judges are instrumentalities of the United States when receiving income and that a tax on their income is tantamount to direct tax upon the United States in violation of the Supremacy Clause. Instead of focusing on the real issue of whether Congress has consented to the levy of this tax on these judges via the Public Salary Tax Act; the Buck Act; and, 5 U.S.C. § 5520, the court of appeals misfocused on the issue of whether the County tax violates the Supremacy Clause.[4] After concluding that a constitutional violation existed, the court of appeals disposed of the issue of Congressional consent by an unsupported construction of the Public Salary Tax Act, 4 U.S.C. § 111 (which subjects the pay of all federal officers to nondiscriminatory state and local taxation) and the Buck Act, 4 U.S.C. § 106-110 (which expressly subjects all federal officers including judges to county occupational tax) so as to carve out exceptions for federal judges. And, the court of appeals ignored 5 U.S.C. § 5520 (which implements the Buck Act and Public Salary Tax Act by establishing the withholding mechanism for the deduction of county occupational tax from the compensation of members of the federal judiciary) and a Presidential Executive Order at 31 C.F.R. § 215.2 (which expressly requires all members of the federal judiciary to cooperate in the withholding of county occupational tax). Moreover, the court of appeals refused to follow several decisions of

[4] If Congress consented to the County tax it is irrelevant whether, in the absence of consent, the tax would be unconstitutional. The issue in this case is whether Congress consented.

this Court which establish the tests to determine whether a particular tax violates intergovernmental immunity or falls within the consent in the Buck Act and Public Salary Tax Act (i.e., the precise issue the court of appeals was considering).

**The decisions of this Court which the court of appeals refused to follow.**

In *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953) this Court examined a municipal tax which is indistinguishable from the instant County tax. The dispositive issue in *Howard* was the same as this case, whether the municipal tax violated the doctrine of intergovernmental tax immunity or fell within the consent of the Buck Act. This Court held that resolution of the question turned on whether the tax was an income tax under *federal* law. This Court applied the *federal* definition of the term "income tax" contained in the Buck Act[5] and held that the Louisville tax was measured by gross receipts; therefore, it was an income tax for purposes of the Buck Act even though denominated a privilege license tax under Kentucky law. This Court held that it makes no difference how the tax is denominated under state law: "[t]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act. . . . We hold the tax

[5] The term "income tax" is defined in the Buck Act, 4 U.S.C. § 110(c) as: "The term income tax means any tax *levied* on, with respect to or *measured by* net income, gross income or *gross receipts*.



authorized by this ordinance was an income tax within the meaning of federal law." 344 U.S. at 628-9.

In the instant case the court of appeals violated the spirit and rule of *Howard* by ignoring the *federal* definition of the term "income tax" and instead relied on Alabama's characterization of the County tax as a privilege license tax. The court of appeals' refusal to follow *Howard* is illustrated by the following sentence from its opinion: " . . . if the state court's denomination is a reasonable interpretation of the ordinance, we deem it conclusive." 92 F.3d at 1570. Thus, the court of appeals concluded that the County tax was not saved by the Buck Act because it was not an income tax under *state* law.

By applying state law, the court of appeals subverted the plain language of the Buck Act and ignored the test established by this Court in *Howard*. Moreover, the test used by the court of appeals was expressly rejected by this Court in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) and again in *United States v. New Mexico*, 455 U.S. 720 (1982).

In *United States v. New Mexico, supra*, this Court held:

> . . . [i]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the federal government shoulders the entire burden of the levy.
>
> * * *
>
> . . . [t]ax immunity is appropriate in ***only one circumstance:*** when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the

> two cannot be realistically viewed as separate entities. . . .

455 U.S. 734, 735.

In *Graves v. New York, ex rel. O'Keefe, supra,* this Court held:

> The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable.

306 U.S. at 480.

> So much of the burden of a *non discriminatory general tax* upon the *incomes* of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the constitution presupposes, and hints it cannot rightly be deemed to be within an implied restriction of the taxing power of the national and state governments which the constitution has expressly granted to one and has to be confirmed to the other. *The immunity is not one to be implied from the constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the constitution has reserved to the state governments.*

306 U.S. at 487.

Ignoring the foregoing, the court of appeals ruled that a tax on the income of a federal judge is tantamount



to a direct tax on the United States. This conclusion is in direct conflict with *O'Keefe, supra,* which holds that the levy of an income tax on a federal employee does not violate tax immunity. The conclusion is puzzling given that the court of appeals paid lip service to *O'Keefe*[6] but then refused to follow it. The holding is more puzzling because the evidence was undisputed and the trial court expressly found that the tax was paid by the judges out of their own funds and the tax imposed *no economic burden on the United States.* 850 F.Supp. at 1544. The court of appeals expressly stated: "[w]e hold that the legal incidence of the tax falls on the federal judge." 92 F.3d at 1571. How is it possible for the levy of an income tax on the private monies of a federal judge to be deemed to a violation of the tax immunity doctrine? According to this Court in *O'Keefe* it is not possible!

The court of appeals simply rejected the modern decisions of this Court and resurrected the old doctrine of intergovernmental tax immunity as it existed before the turn of the century. Now the law in the Eleventh Circuit is that federal judges are exempt from a state tax which is clearly an *income tax* as defined by *federal* law (i.e., the

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[6] "We accept that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge may be no more intimately connected with the federal government when receiving income than the federal employee in *O'Keefe.*" 92 F.3d at 1571-72. "Therefore, this case is not controlled by *O'Keefe's* holding that income taxes do not interfere with federal functions in violation of the intergovernmental tax immunity doctrine." 92 F.3d at 1570.

Buck Act). That holding has far reaching and embarrassing consequences for the federal judiciary. First, under the Buck Act definition of the term "income tax" there is no way to distinguish between the county tax and the income taxes of Alabama and other states. They are all "income taxes" under the Buck Act. If the federal judges are really "the United States" and if the county tax on their income violates intergovernmental tax immunity, *so do the state income taxes*! Thus, the court of appeals effectively immunized the Article III judges[7] in the Eleventh Circuit from all state taxes by holding that federal judges are the United States for purposes of evading taxes.

While exempting themselves from income taxation, the majority of the court of appeals apparently failed to consider that the dinosaur they were resurrecting also shields state and local employees from federal taxation. The doctrine is a two way street. Once resurrected it shields the employees of *both* sovereigns from taxation by the other. Thus, it follows from the court of appeals decision that state and municipal workers in the Eleventh Circuit are now immune from federal taxation!

**The Acts of Congress and Presidential Executive Orders which the court of appeals ignored or re-wrote to carve out a judicial exception to Congressional consent to local taxation**

When confronted with the obstacle of express Congressional consent to the levy of the county occupational

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[7] It is already being asserted that other federal employees in Jefferson County are similarly immunized from the County tax.



tax upon judicial pay, the trial court simply held the Buck Act and Public Salary Act unconstitutional as applied to federal judges. 850 F.Supp. at 1545, 46. The court of appeals affirmed but, apparently recognizing the recklessness of the trial court's conclusion, never actually held the Acts to be unconstitutional as applied to judges. Instead, a majority of the court of appeals accomplished the same result by rewriting the Acts to exempt themselves from coverage.

The Public Salary Act provides:

> The United States consents to the taxation of *pay or compensation* for personal service as an officer or employee of the United States, a territorial possession or political subdivision thereof, the government of the District of Columbia, or an agency or *instrumentality* of one or more of the foregoing by a duly constituted taxing authority having jurisdiction, *if the taxation does not discriminate* against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111.

Nothing in the Act amounts to only a *partial waiver* of tax immunity. The Act does not distinguish between types of taxes. It does not exclude from its scope any occupational, privilege or license taxes. It is not limited to *some* federal officers or employees. The only limitation in the Act is that the tax be nondiscriminatory. Respondents never contended that the tax was discriminatory. The evidence before the court was undisputed that federal employees *and particularly federal judges* are treated in exactly the same manner as state and local employees and

private citizens.[8] Therefore, the county tax satisfies the only test in the Public Salary Tax Act.

Yet, incredibly, the court of appeals held that Congress's consent in the Public Salary Tax Act to the "taxation of pay or compensation for personal service as an officer or employee of the United States" does not include the County's tax on the pay or compensation of a federal judge. 92 F.3d at 1574. The court of appeals cited no authority to back up its reading of the Public Salary Tax Act.[9] *The court of appeals' holding in this case is the only reported opinion in the United States which holds that the Public Salary Tax Act does not apply to federal judges.*

Having eviscerated the Public Salary Tax Act, the court of appeals turned to the Buck Act. The Buck Act provides:

> No person shall be relieved from liability for any *income tax* levied by any state, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a federal area, or *receiving*

[8] The evidence in this case is undisputed that the County tax is paid by all 27 state judges within Jefferson County, Alabama, and by three state Supreme Court justices who have satellite offices in the County. [R1-34-36]

[9] The Court of Appeals holding in this case *directly conflicts* with the holding of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985). In that case the Third Circuit held that a municipal privilege license tax on the compensation of federal court reporters was within the scope of consent provided by the Public Salary Tax Act. And, the Third Circuit disregarded the fact that the Pennsylvania Supreme Court had declared that the municipal tax was a privilege tax rather than an income tax under state law.



> *income from transactions occurring or services performed in such area;* and such state or taxing authority shall have full jurisdiction and power to levy and collect such tax within the federal area within such state to the same extent as though such area was not a federal area.

4 U.S.C. § 106(a).

As noted earlier in this petition, the term "income tax" is defined by the Buck Act as: "any tax levied on, with respect to or measured by, net income, gross income or gross receipts."[10] 4 U.S.C. § 110(c). And, the term "federal area" is defined broadly in the Buck Act to encompass premises used by the United States for the purpose of operating a federal courthouse. 4 U.S.C. § 110(e).

Examination of the Senate Report on the Buck Act definition of the term "income tax" confirms that Congress deliberately chose a broad definition to include local privilege license taxes and occupational taxes:

> [t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different state laws. The intent of your committee in laying down such a broad definition was to include therein any state tax (whether known as a corporate-franchise tax, or *business privilege tax*, or any other name) if it is levied on, with respect to or measured by net income, gross income, or gross receipts.

[10] The Jefferson County occupational tax is measured by gross receipts.

* * *

> The Buck Act "income tax", broadly defined as it is, refers to the broad, generic class of taxes upon income. *It does not require that the tax be denominated an income tax or that it conform to the federal income tax.* If the tax in question is based upon income, and is *measured by* that income in money or monies worth, if a net income tax, gross income tax or *gross receipts tax*, it is an "income tax".

Senate Report No. 1625, 76th Cong., 3rd Session (1940).

The provisions of the Buck Act and Public Salary Tax Act are implemented by 5 U.S.C. § 5520[11] and 31 C.F.R.

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[11] 5 U.S.C. § 5520 providing:

(a) When a county or city ordinance –

> (1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sum to a designated city or county officer, department or instrumentality and
>
> (2) imposes the duty of withholding generally on the payment of compensation earned within the jurisdiction of the city or county in the case of employees whose regular place of employment is within such jurisdiction.

The secretary of the treasury, under regulations prescribed by the President, shall enter into an agreement with the city or county within 120 days of a request for agreement by the proper city or county official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the city or county ordinance in the case of any employee of the *agency* who is subject to the tax and (i) whose regular place of federal employment is within the jurisdiction of the city or county with which the agreement is made or (ii) is a resident of such city or county.



§ 215.2[12] both of which expressly declare that the consent to taxation includes the salaries of federal judges.

Since (1) the county tax is an income tax under the Buck Act; and (2) this Court has held that an income tax on the income of a federal employee, however important the position, is not a tax on the United States or an

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* * *

(c) For the purpose of this section

> (4) "Agency" means –
>
> (a) An executive agency;
>
> (b) The ***judicial branch***; and
>
> (c) The United States Postal Service.

[12] 31 CFR § 215.2:

(a) "Agency" means each of the executive agencies and the military departments (as defined in 5 U.S.C. §§ 105 and 102 respectively) and the United States Postal Service and in addition for city or county withholding purposes only ***all elements of the judicial branch.***

* * *

(f) "County income or employment taxes" means *any form of tax* for which, under a county ordinance

> (1) Collection is provided by imposing on employers generally the duty of withholding sums from the pay of employees and making return of the sums to a designated county officer, department or instrumentality, and;
>
> (2) The duty to withhold generally is imposed on the payment of compensation earned within the jurisdiction of the County in the case of an employee whose regular place of employment is within such jurisdiction. ***Whether the tax is described as an income tax, wage, payroll, earnings, occupational license or otherwise is immaterial.***

instrumentality thereof, *O'Keefe, supra;* and (3) the court of appeals conceded: " . . . a federal judge is not an instrumentality of the federal government when the activity being taxed is the receipt of income" 92 F.3d at 1571; it follows that the court of appeals could only conclude that Congress consented to the levy of this tax on these judges.

Instead, the court of appeals took the opportunity to elevate federal judges above all other federal employees by holding that they alone are outside the scope of the Congressional consent contained in the Public Salary Tax Act and Buck Act. Now, in Jefferson County, all governmental employees except federal judges pay the County tax. Now, in the Eleventh Circuit the Buck Act; Public Salary Tax Act; 5 U.S.C. § 5520; and, 31 C.F.R. § 215.2 mean the *opposite* of what they say. Now, in the Eleventh Circuit *Howard v. Commissioners of Sinking Fund of City of Louisville; Graves v. New York ex rel. O'Keefe;* and, *Arkansas v. Farm Credit Services* are not to be followed.

## CONCLUSION

Congress consented to the levy of this tax on these judges. It is therefore irrelevant whether the County tax would, in the absence of such consent, violate the Supremacy Clause. The court of appeals' decision that federal judges are the United States and are therefore exempt from all state or local taxation is not supported by legal authority or by common sense. The decision resurrects notions of federal judicial immunity from the usual and ordinary cost of citizenship in this country that this Court and the U. S. Congress expressly rejected many years ago.



Removal of this case was improper under the federal officer removal statute because Respondents failed both elements of the test established by this Court in *Mesa v. California, supra* and because federal jurisdiction is barred by the TIA. Respondents are not federal instrumentalities and, pursuant to *Arkansas v. Farm Credit Services,* they are not entitled to the judicial exception to the TIA because the United States is not a party.

This case falls squarely within Supreme Court Rule 10(a) and (c). The decision of the Court of Appeals is in direct conflict with *Arkansas v. Farm Credit Services; Howard v. Commissioners of Sinking Fund of City of Louisville; Graves v. New York ex rel. O'Keefe;* the Third Circuit's decision in *United States v. City of Pittsburgh, supra;* and, the Ninth Circuit's decision in *Housing Authority of Seattle v. Washington Dep't of Revenue,* 629 F.2d 1307, 1311 (9th Cir. 1980).

The County urges this Court to grant this PETITION FOR WRIT OF CERTIORARI to the ELEVENTH CIRCUIT COURT OF APPEALS and either remand the case to state court for lack of federal jurisdiction or reverse the court of appeals' decision and render judgment in favor of the County on the merits.

Respectfully submitted,

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**JEFFERSON COUNTY, a political subdivision of the State of Alabama, Plaintiff-Appellant,**

**v.**

**William M. ACKER, JR., Defendant-Appellee.**

**JEFFERSON COUNTY, A political subdivision of the State of Alabama, Plaintiff-Appellant,**

**v.**

**U.W. CLEMON, Defendant-Appellee.**

**No. 94-6400.**

United States Court of Appeals, Eleventh Circuit.

March 27, 1998.

Appeal from the United States District Court for the Northern District of Alabama.

Before HATCHETT, Chief Judge, TJOFLAT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges,* and HENDERSON and KRAVITCH**, Senior Circuit Judges.

COX, Circuit Judge:

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* Judges Frank M. Hull and Stanley Marcus became members of the court after this case was argued and taken under submission. They elected not to participate in this decision.

** Senior U.S. Circuit Judges Henderson and Kravitch elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

The issue presented by this case is whether Jefferson County, Alabama may require Article III judges to pay a tax for the privilege of engaging in their occupation within the county. In our earlier *en banc* opinion[1] we affirmed the district court's grant of summary judgment for the defendants, holding that the tax violates the Supremacy Clause of the Constitution. The Supreme Court vacated our judgment and remanded the case for reconsideration in light of its recent decision in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997), directing us to consider the effect of the Tax Injunction Act, 28 U.S.C. § 1341, on federal jurisdiction in this case. Upon reconsideration we hold that the district court had jurisdiction and reinstate our *en banc* opinion on the merits.

## I. BACKGROUND[2]

Jefferson County Ordinance No. 1120 imposes a tax on persons not otherwise required to pay a license or privilege tax to the State of Alabama or Jefferson County. It states in pertinent part:

> It shall be unlawful for any person to engage in or follow any vocation, [etc.], within the County . . . without paying license fees to the County for the privilege of engaging in or following

[1] *Jefferson County v. Acker*, 92 F.3d 1561 (11th Cir.1996) (en banc).

[2] As our consideration of the jurisdictional issue primarily concerns issues of law, we have summarized the facts briefly here; a more complete account appears in our earlier *en banc* opinion. *See Acker*, 92 F.3d at 1563-66.



> such vocation, [etc.], which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance No. 1120, § 2 (Sept. 29, 1987). Defendants William M. Acker, Jr. and U.W. Clemon are United States District Judges for the Northern District of Alabama who maintain their principal offices in Birmingham, the Jefferson County seat. They refused to pay the privilege tax, contending that the tax as applied to federal judges violates the United States Constitution. Jefferson County subsequently sued them in state court to recover delinquent privilege taxes under the ordinance. The defendants removed the cases to federal court pursuant to 28 U.S.C. § 1442(a)(3); Jefferson County moved to remand, but the motion was denied. The cases subsequently were consolidated.

The district court granted summary judgment for the defendants, holding that the legal incidence of the tax fell not upon the judges but upon the federal judicial function itself, thus constituting a direct tax on the United States in violation of the intergovernmental tax immunity doctrine. *See Jefferson County v. Acker*, 850 F.Supp. 1536, 1545-46 (N.D.Ala.1994) (subsequent history omitted). The district court also held that as applied to federal judges the ordinance violated the Compensation Clause of Article III. *See id.* at 1547-58. Jefferson County appealed, and a panel of this court reversed. *See Jefferson County v. Acker*, 61 F.3d 848 (11th Cir.1995) (subsequent history omitted).

On rehearing *en banc*, this court affirmed the district court's ruling with respect to the intergovernmental tax immunity doctrine, stating that any holding with respect

to the Compensation Clause was unnecessary. *See Jefferson County v. Acker*, 92 F.3d 1561, 1576 (11th Cir.1996) (subsequent history omitted). With respect to the immunity issue, we concluded that although the privilege tax is *measured* by the income of the taxed individual, the taxable *event* is the performance of federal judicial duties in Jefferson County. *See id.* at 1572. As such, the privilege tax represents a fee that a federal judge must pay to lawfully perform his or her duties, and therefore a direct tax on the United States. *See id.* We further determined that Congress did not consent to such taxation; as the states may not levy a direct tax on the United States without Congress' consent, we held that the tax is unconstitutional as applied to the judges. *See id.* at 1573-76.

Jefferson County then filed in the Supreme Court a petition for a writ of certiorari. The Solicitor General submitted an *amicus* brief on behalf of Jefferson County, in which it argued that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, barred federal jurisdiction over the case. In a brief memorandum opinion, the Supreme Court vacated our *en banc* judgment and remanded the case for consideration of the TIA's effect on federal jurisdiction in light of the recent decision in *Arkansas v. Farm Credit Services*, ___ U.S. ___, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997). Jefferson County raised the jurisdictional issue in the district court in its unsuccessful motion to remand, but on appeal did not. Therefore, this is the first time that the issue has been raised in this court. We review jurisdictional rulings and other questions of law *de novo*. *See, e.g., McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir.1996).



## II. DISCUSSION

### A. *Does the Federal Officer Removal Statute Apply?*

The defendants removed this case to federal court under 28 U.S.C. § 1442(a)(3), the section of the federal officer removal statute applicable to federal court officers. Jefferson County contends that this case does not fall within the ambit of the statute, and that removal of the case to federal court was therefore improper.[3] As no other circumstances exist that would support federal court jurisdiction, improper removal would mandate dismissal. Thus, our first inquiry is to determine whether § 1442 applies.

Unlike the general removal statute (28 U.S.C. § 1441), § 1442 is a jurisdictional grant that empowers federal courts to hear cases involving federal officers where jurisdiction otherwise would not exist. *See Loftin v. Rush*, 767 F.2d 800, 804 (11th Cir.1985). It reads in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

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[3] In its brief Jefferson County characterizes this issue as determining whether § 1442 "restores" any federal jurisdiction otherwise denied by the TIA. *See* Supplemental *En Banc* Brief for Appellant at 17. However, as Article III courts have no jurisdiction except by statutory grant, *see, e.g., Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1345 (11th Cir.1997), the proper inquiry for us is to determine first whether § 1442 provided the district court with any jurisdiction for the TIA to deny.

. . . .

> (3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

28 U.S.C.A. § 1442(a)(3) (1994 & Supp.1997). The judges are "officer[s] of the courts of the United States," but removal of an action under this section requires the satisfaction of two additional requirements: (1) the defendant must establish a "causal connection between what the officer has done under asserted official authority" and the action against him, *Maryland v. Soper*, 270 U.S. 9, 33, 46 S.Ct. 185, 190, 70 L.Ed. 449 (1926); and (2) the defendant must advance a "colorable defense arising out of [his] duty to enforce federal law," *Mesa v. California*, 489 U.S. 121, 133, 109 S.Ct. 959, 966-67, 103 L.Ed.2d 99 (1989); *accord Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427-28 (11th Cir.1996). Thus, under the statute federal officers facing state law claims against them arising out of their duties may remove their cases to federal court if they advance a colorable federal defense. *See Arizona v. Manypenny*, 451 U.S. 232, 241-42, 101 S.Ct. 1657, 1664, 68 L.Ed.2d 58 (1981). Jefferson County argues that the judges have not satisfied either requirement.

We agree with the district court that the plain language of § 1442 is sufficiently broad to encompass this case. The Jefferson County ordinance at issue makes it "unlawful for any person to engage in . . . any . . . occupation . . . without paying license fees to the County." Jefferson County, Ala., Ordinance No. 1120, § 2 (Sept. 29, 1987). Under official authority, Judges Acker and Clemon have "engaged in the occupation" of being United States District Judges "without paying license fees to the



County," and as a result the county has sued them. There is a direct causal connection between the judges' acts under official authority and the action against them.

As for the second requirement, Jefferson County in effect urges us to reconsider our decision on the merits, contending that the judges do not have immunity from the tax and therefore have not advanced a "colorable" defense for their refusal to pay. However, § 1442 does not require the resolution of, or even a detailed inquiry into, the merits of the federal defense advanced. One of the primary purposes of § 1442 is to allow officials to have the validity of their federal defenses determined in federal court. *See Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969). For removal to be proper under § 1442, "[the federal defense alleged] need only be plausible; its ultimate validity is not to be determined at the time of removal." *Magnin*, 91 F.3d at 1427. At the time of removal the judges' immunity defense was at least "plausible," a conclusion supported by both the district court's grant of summary judgment for the judges and this court's subsequent affirmance. We hold that the federal officer removal statute is sufficiently broad to permit removal of this case.

B. *Does the Tax Injunction Act Preclude Federal Jurisdiction?*

The next issue to be resolved is the effect, if any, of the Tax Injunction Act (TIA) on federal jurisdiction in this case. Before the passage of the TIA, equity practice directed federal courts to abstain in cases involving state taxation out of concern for undue federal interference

with the States' internal economies. *See, e.g., Matthews v. Rodgers,* 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (1932). The TIA represents a congressional recognition and sanction of this prior practice. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, 48 L.Ed.2d 96 (1976). It states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341 (1994). Congress' purpose in enacting the TIA was "to deny jurisdiction to United States district courts to . . . restrain the assessment, levy, or collection" of state taxes. H.R.REP. NO. 75-1503 (1937) (House Judiciary Committee report recommending passage of TIA). As such, the TIA is not a guide to abstention, but a "jurisdictional rule," *Farm Credit Servs.,* ___ U.S. at ___, 117 S.Ct. at 1779 (1997), stripping federal courts of the power to grant relief, *see United Gas Pipe Line Co. v. Whitman,* 595 F.2d 323, 326 (5th Cir.1979) ("[T]he history of section 1341, from its precursor federal equity practice to its most current judicial construction, evidences that it is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems.").

1. *Does the Language of the TIA Cover This Case?*

The TIA only applies to situations involving a "tax under State law" and in which the state does not provide a "plain, speedy and efficient remedy." 28 U.S.C. § 1341



(1994). Neither party contends that the tax at issue is not a "tax under state law" within the meaning of the TIA, so we will assume *arguendo* that it is, an assumption consistent with the law in this circuit.[4] As for the existence of a "plain, speedy and efficient remedy" in the Alabama courts, Jefferson County argues that the Alabama Declaratory Judgment Act, ALA.CODE § 6-6-220 (1997), and the judges' ability to assert their constitutional objections to the tax as affirmative defenses in their answer in a state court suit provide the necessary remedies. *See* Supplemental *En Banc* Brief for Appellant at 15-16. The defendants do not contest the issue,[5] but in any event we agree with Jefferson County's argument on this point. *See Richards v. Jefferson County,* 789 F.Supp. 369, 371 (N.D.Ala.) (finding Alabama's remedies adequate for TIA purposes

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[4] Under our case law, the ordinance would seem to levy a "tax" rather than a regulatory "fee." *See Miami Herald Publishing Co. v. City of Hallandale,* 734 F.2d 666, 672 (holding that effect of similar "license fee" regulation was to raise general revenue, thus rendering it a "tax" for purposes of the TIA), *clarified,* 742 F.2d 590 (11th Cir.1984). While no court has explicitly held that local taxes constitute taxes "under State law," numerous decisions have applied the TIA to bar federal jurisdiction in cases involving local taxes. *See, e.g., Rosewell v. LaSalle Nat'l Bank,* 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981); *North Georgia Elec. Membership Corp. v. City of Calhoun,* 989 F.2d 429 (11th Cir.1993), *aff'd,* 989 F.2d 429 (11th Cir.1993); *United States v. Broward County,* 901 F.2d 1005 (11th Cir.1990); *Williams v. City of Dothan,* 818 F.2d 755, *modified,* 828 F.2d 13 (11th Cir.1987).

[5] Most of the defendants' substantive arguments are contained in the brief filed by United States District Judges Hancock, Propst, Nelson and Blackburn as *amici curiae,* which the defendants adopt in its entirety. *See* Supplemental *En Banc* Brief for Appellees at 8.

in suit concerning same ordinance), *aff'd*, 983 F.2d 237 (11th Cir.1992). We hold that the case at bar falls within the scope of the TIA.

2. *Does the TIA Bar Federal Jurisdiction?*

Our holding that the TIA applies does not necessarily foreclose federal jurisdiction, as there are two exceptions to the literal proscriptions of the statute: First, as the TIA is a legislative enactment, Congress is of course free to create exceptions to the act in other legislation. Federal courts have found both express and implied congressional intent to create exceptions to the TIA in other jurisdictional statutes. *See City and County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1276 (9th Cir.1997); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Johnson & Cravens, 13911, Inc.*, 858 F.2d 1010, 1015 (5th Cir.1988), *vacated on other grounds*, 889 F.2d 571 (5th Cir.1989); *Southern Ry. Co. v. State Bd. of Equalization*, 715 F.2d 522, 529-30 (11th Cir.1983). Second, the statute "does not constrain the power of federal courts if the United States sues to protect itself or its instrumentalities from state taxation," *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1778, even if the case falls within the literal language of the statute. This judicially created "federal instrumentality" exception is based on the understanding that the sovereign is not bound by its own legislative restrictions unless it expressly intends to bind itself. *See id.* at ___, 117 S.Ct. at 1781. Thus, both exceptions involve a determination of congressional intent to allow federal jurisdiction notwithstanding the TIA's proscriptions. We examine them in turn.



a. *Does § 1442 Override the TIA?*

The defendants contend that § 1442, without more and in all cases, overrides the TIA, giving them an absolute right to remove to federal court. We reject this contention. As a statute that *strips* federal jurisdiction, the TIA assumes a preexisting statutory grant; without such a grant, there would be no jurisdiction for the TIA to strip away. The Supreme Court has spoken directly on this point:

> Since presumably all actions properly within the jurisdiction of the United States district courts are authorized by one or another of the statutes conferring jurisdiction upon those courts, the mere fact that a jurisdictional statute . . . speaks in general terms of "all" enumerated civil actions does not itself signify that [an entity is] exempted from the provisions of [the TIA].

*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472, 96 S.Ct. 1634, 1641, 48 L.Ed.2d 96 (1976);[6] *see also Bank of New England Old Colony v. Clark*, 986 F.2d 600, 603, 604 (1st Cir.1993) ("For the FDIC to prove that the [FIRREA] removal statute trumps the [TIA], it must show that Congress clearly and manifestly intended the statute to be an exception. . . . The mere fact that [the removal statute] states that the FDIC may remove 'all' actions does not in itself demonstrate the clear and manifest

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[6] Although it relied on the principle of comity underlying the TIA rather than the act itself, the Court came up with the same result with respect to tax refund actions under 42 U.S.C. § 1983. *See Fair Assessment in Real Estate Assoc. v. McNary*, 454 U.S. 100, 116, 102 S.Ct. 177, 186, 70 L.Ed.2d 271 (1981).

intent of Congress to trump the [TIA]. . . . Such language, rather, is consistent with a general grant of jurisdiction which did not take into account the provisions of the Act." (citations omitted)); *Ashton v. Cory*, 780 F.2d 816, 822 (9th Cir.1986) (ERISA § 502 (29 U.S.C. § 1132(e)(1)) is not exception to TIA, because "[i]n the absence of . . . express congressional action, we cannot infer that Congress intended impliedly to take the drastic step of carving out an exception to the Tax Injunction Act"). In light of the reasoning of the Supreme Court and of other federal courts, we reject the defendants' argument and hold that § 1442 standing alone is not a universal exception to the TIA.

b. *Do the Defendants Come Within The "Federal Instrumentality" Exception to the TIA?*

We have found no direct evidence of congressional intent to allow the defendants to bypass the TIA in the language of the statutes at issue. However, in *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 467, 17 L.Ed.2d 414 (1966), the Supreme Court set forth a judicial exception to the TIA based on implied congressional intent, holding that "[the TIA] does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." The Court's holding was based on the understanding that the government is not bound by its own legislative restrictions unless it expressly intends to bind itself. *See Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1781; *see also Dollar Sav. Bank v. United States*, 86 U.S. (19 Wall.) 227, 239, 22 L.Ed. 80 (1873). In other words, the



Court assumed that in enacting the TIA Congress did not intend to prevent the United States from asserting its own tax immunity in federal court. Thus the judicial exception, also known as the "federal instrumentality exception," allows the federal government to contest state taxation of its instrumentalities in federal court notwithstanding the restrictions of the TIA. *See, e.g., United States v. Broward County*, 901 F.2d 1005, 1008 (11th Cir.1990); *Dawson v. Childs*, 665 F.2d 705, 710 (5th Cir. Unit A Oct.1980); *United States v. Lewisburg Sch. Dist.*, 539 F.2d 301, 310 (3d Cir.1976).

1. *Arkansas v. Farm Credit Services*

Read literally, however, the exception articulated in *Department of Employment* only applies to "suits *by the United States* to protect itself and its instrumentalities" from state taxation. 385 U.S. at 358, 87 S.Ct. at 467 (emphasis added). The few circuit court cases addressing the issue are split on whether federal instrumentalities may contest state taxes in federal court without the government as a co-party. *Compare, e.g., FDIC v. City of New Iberia*, 921 F.2d 610, 613 (5th Cir.1991) (FDIC is federal instrumentality that may contest state tax in federal court without United States as co-plaintiff) *with, e.g., Housing Auth. of Seattle v. State of Washington, Dep't of Revenue*, 629 F.2d 1307, 1311 (9th Cir.1980) (joinder with the United States as co-plaintiff necessary for instrumentality to avoid TIA). This was the issue the Supreme Court set out to address in *Farm Credit Services*.

*Farm Credit Services* concerned Production Credit Associations (PCAs), federally chartered corporations

whose organic statute explicitly designates them as "instrumentalities" of the United States. *See* 12 U.S.C. §§ 2071(b)(7), 2077 (1994). PCAs are exempt by federal statute from state taxes on their "notes, debentures, and other obligations." *See* 12 U.S.C. § 2077 (1994). In *Farm Credit Services*, four PCAs sued the state of Arkansas in federal district court, claiming immunity not only from the taxes explicitly designated in § 2077, but from Arkansas sales and income taxes as well. The government did not participate in the suit, and the Solicitor General submitted an *amicus* brief opposing jurisdiction. Thus, the case turned on whether the PCAs could utilize the *Department of Employment* exception without the joinder of the government as a co-party. The Supreme Court held that the TIA barred the PCAs from contesting the tax in federal court unless the United States participated on their behalf. *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1780.

The Court has directed us to consider the jurisdictional issue in this case in light of *Farm Credit Services.* While the *Farm Credit Services* Court held that PCAs could not sue in federal court without the United States as co-party, it did not extend that holding to other instrumentalities; the result in *Farm Credit Services* seems to hold open the "federal instrumentality" exception for entities litigating on their own. Jefferson County's brief characterizes *Farm Credit Services* as holding that "federal courts [have] no jurisdiction over a dispute involving the collection of a state tax from a federal instrumentality *unless the United States* [is] *a co-party.*" Supplemental *En Banc* Brief for Appellant at 16. This is a clear misreading of the opinion, which states only that "instrumentality



status does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1782; *see also City and County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1277 (9th Cir.1997) (interpreting *Farm Credit Services* as allowing some instrumentalities to bypass the TIA without the United States' participation). In fact, the *Farm Credit Services* Court reviewed different approaches used by the circuits and noted that a rule barring all federal instrumentalities from federal court unless the United States participates is the "most restrictive approach" of those used. *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1781.

With respect to the PCAs, the Court held that "[u]nder any of the tests . . . described, PCA's would not be exempt from [the TIA]." *Id.* at ___, 117 S.Ct. at 1782. The factor that seems to have weighed most heavily in the Court's decision is the PCAs' quasi-private status:

> The PCA's' business is making commercial loans, and all their stock is owned by private entities. Their interests are not coterminous with those of the Government any more than most commercial interests. Despite their formal . . . designation as instrumentalities of the United States, . . . PCA's do not have or exercise power analogous to that of . . . any of the departments or regulatory agencies of the United States.

*Id.* Article III judges are completely dissimilar from PCAs. *Farm Credit Services* therefore informs our analysis, but does not answer the question before us with regard to Judges Acker and Clemon. However, the opinion cites

with seeming approval two cases which are helpful to our inquiry: *Moe v. Confederated Salish & Kootenai Tribes*,[7] *see id.* at ___, ___ U.S. at ___, 117 S.Ct. at 1781 ("*Moe* is instructive here."), and *Federal Reserve Bank v. Commissioner of Corps. and Taxation*,[8] *see id.* at ___, ___ U.S. at ___, 117 S.Ct. at 1782. We now examine those cases.

2. *Moe v. Confederated Salish & Kootenai Tribes*

In *Moe*, the Court affirmed a district court ruling that extended the United States' *Department of Employment* exception to Native American tribes suing in federal court. The district court allowed the tribes to bypass the TIA under the exception and enjoin the collection of state taxes from cigarette sales. It based this ruling on two alternative grounds: (1) that the United States' significant interest in the tribes qualified them for the exception, and a symbolic joinder of the United States would serve no purpose; and (2) that a separate jurisdictional statute, 28 U.S.C. § 1362,[9] which gives Native Americans special access to federal court, embodied a congressional purpose to allow the tribes to sue in federal court as if they

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[7] 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

[8] 499 F.2d 60 (1st Cir.1974).

[9] The statute reads:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362 (1994).



were the United States. *See Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1303-04 (D.Mont.1974).

The Supreme Court affirmed the ruling, but found each of the district court's grounds insufficient standing alone to justify allowing the tribes to bypass the TIA. The Court first stated that although the tribes' asserted interests coincided with those of the federal government, perhaps qualifying them for federal "instrumentality" status, this congruence of interests was insufficient by itself to exempt the tribes from the TIA. *See Moe*, 425 U.S. at 471-72, 96 S.Ct. at 1640-41. Likewise, the Court refused to interpret § 1362 as a blanket exception to the TIA. *See id.* at 472, 96 S.Ct. at 1641. ("[T]he mere fact that a jurisdictional statute such as § 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of [the TIA].").

Instead, the Court affirmed the district court on a hybrid of the two grounds. The Court assumed that the United States could have sued on behalf of the tribes by itself or as co-plaintiff, because of the congruence of the tribes' interests and those of the government. The Court also found that § 1362 evidenced a congressional intent to allow Native American tribes, in some circumstances, to participate in federal court as if they were the United States suing as the tribes' trustee. The Court held that under the circumstances of the case the tribes could use § 1362 to stand in the place of the United States and enjoy the benefit of the *Department of Employment* exception. *See id.* at 474-75, 96 S.Ct. 1641-42.

3. *Federal Reserve Bank v. Commissioner of Corps. & Taxation*

*Federal Reserve Bank* involved a declaratory judgment action brought in federal court by the Federal Reserve Bank of Boston, which sought to avoid Massachusetts sales tax on materials used to construct its new building. The First Circuit's decision allowed the bank to contest the tax in federal court without the United States as co-plaintiff. The court began by accepting the bank's status as a federal instrumentality, framing the case in terms of what it deemed the proper issue:

> [T]he present case does not turn on whether federal reserve banks are instrumentalities. Plainly they are. The question is whether there is any reason to treat [the bank] differently from instrumentalities [not eligible for an exemption from the TIA] like savings and loan associations. . . . Is [the bank] privileged, like the United States itself, to maintain this proceeding?

*Federal Reserve Bank*, 499 F.2d at 62. The First Circuit noted that in answering the question of whether an entity could use the instrumentality exception without the participation of the government, "we must accept the absence of any bright line to facilitate analysis; each instrumentality must be examined in light of its governmental role and the wishes of Congress as expressed in relevant legislation." *Id.* at 64.

The court decided that the bank was a federal instrumentality eligible for the *Department of Employment* exception, citing several factors in favor of its conclusion. First, the court noted that the bank performed significant governmental functions, serving primarily as a "fiscal arm[ ]



of the federal government," and thus a state tax affecting the bank would "call[ directly into question the sovereign interest of the United States." *Id.* at 62, 63. Second, the bank had the benefit of a special jurisdictional statute giving it access to the federal courts; the court stated that "[s]uch a clearly expressed strong federal interest in litigating all reserve bank business in the federal courts further tips the scale away from the general hostility to interfering with [state taxation]." *Id.* at 63. Third, the bank occupied a special place in the governmental structure "outside the executive chain of command," *id.*, which militated against forcing the bank to acquire the Attorney General's approval before going to court. Thus, the court concluded, the bank could "proceed in a federal forum under the same exception . . . available to the United States were it a named plaintiff." *Id.* at 64.

4. *Are the Judges Eligible for the Exception?*

We conclude that the defendants' situation more closely resembles that of the Native American tribes in *Moe* and the bank in *Federal Reserve Bank* than the PCAs in *Farm Credit Services*. The *Farm Credit Services* Court was concerned that PCAs are basically commercial lenders, whose interests "are not coterminous with those of the Government any more than most commercial interests." *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1782. In contrast, the *Federal Reserve Bank* court concluded that

> [w]hile savings and loan associations may . . . be analogized to private corporations, federal reserve banks, . . . are plainly and predominantly fiscal arms of the federal government.

> Their interests seem indistinguishable from those of the sovereign. . . .

*Federal Reserve Bank*, 499 F.2d at 62. Likewise, the *Moe* Court assumed that the Native American tribes at issue in that case had interests closely aligned with those of the United States, at least as far as taxation was concerned. *See Moe*, 425 U.S. at 471, 473-74, 96 S.Ct. at 1640, 1641-42.

As one of the three branches of the federal government, the federal judiciary's interests are congruent with, if not identical to, those of the United States. We held in our prior *en banc* opinion that "[w]hen performing federal judicial duties, a federal judge performs the functions of government itself, and cannot realistically be viewed as a separate entity from the federal court." *Acker*, 92 F.3d at 1572 (internal quotation and citation omitted). In interpreting the statute regarding the duties of the Attorney General, the Supreme Court rejected the argument that cases "in which the United States is interested" are solely those cases in which the interests of the executive branch are at stake. *United States v. Providence Journal Co.*, 485 U.S. 693, 701, 108 S.Ct. 1502, 1507-08 (1988). The Court stated: "It seems to be elementary . . . that the three branches are but co-ordinate parts of one government. . . . [W]e shall not assume that [Congress] intended . . . to exclude the judicial branch when it referred to the 'interest of the United States.' " *Id.* (internal quotation and citation omitted).

Another factor present in this case as well as in *Moe* and *Federal Reserve Bank*, but notably absent from *Farm Credit Services*, is the existence of a special jurisdictional



statute.[10] Both *Moe* and *Federal Reserve Bank* concluded that special jurisdictional statutes, without more, were insufficient to override the TIA, but were evidence of congressional intent that the entities in question be allowed to stand in the place of the United States in federal court. While we have refused to read § 1442 as a blanket exemption to the TIA, we likewise find in the statute a congressional intent that federal officers' access to the federal courts "[will] be at least in some respects as broad as that of the United States." *Moe*, 425 U.S. at 473, 96 S.Ct. at 1641. As Congress recently noted, "[section 1442] fulfills Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." S.REP. NO. 104-366 at 31 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4202, 4210. The United States can only act through its agents and officers; when those officers remove a case to federal court under § 1442 they are, in effect, appearing in court for the United States. The case

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[10] In interpreting *Farm Credit Services*, the Ninth Circuit has concluded that such a statute is a prerequisite for an entity wishing to utilize the federal instrumentality exception without the United States as a co-party. *See City & County of San Francisco v. Assessment Appeals Bd.*, 122 F.3d 1274, 1277 (9th Cir.1997) ("A federal instrumentality does not have to join the United States as a party, however, when a 'second federal statute grant[ing] sweeping federal court jurisdiction' exists.") (quoting *Farm Credit Servs.*, ___ U.S. at ___, 117 S.Ct. at 1781). Other federal court decisions predating *Farm Credit Services* have held similarly. *See MRT Exploration Co. v. McNamara*, 731 F.2d 260, 265 (5th Cir.1984); *North Georgia Elec. Membership Corp. v. Calhoun*, 820 F.Supp. 1403, 1407-08 (N.D.Ga.1992), *aff'd*, 989 F.2d 429 (11th Cir.1993); *National Carriers' Conf. Comm. v. Heffernan*, 440 F.Supp. 1280, 1283 (D.Conn.1977).

before us directly implicates the congressional concerns addressed by § 1442, and "[s]uch a clearly expressed strong federal interest in litigating [such cases] in the federal courts further tips the scale away from the general hostility to interfering with a state taxing scheme." *Federal Reserve Bank*, 499 F.2d at 63.

Finally, important structural concerns militate against us requiring the defendants to acquire the support of the United States in this case. Much like the federal reserve banks, the federal judiciary operates "outside of the executive chain of command," *Id.* There are good reasons not to insist that the federal judiciary acquire the support of the Attorney General in order to assert Supremacy Clause immunity, not the least of which is the ever-present possibility of conflict between the executive and judicial branches. The federal instrumentality exception represents a judicial finding of Congress' implied intent in enacting the TIA; refusing to apply the exception in this case would be equivalent to a finding that Congress intended to put the judicial branch at the mercy of the executive.

Like the Native American tribes in *Moe* and the bank in *Federal Reserve Bank*, the defendants in this case have interests closely aligned with those of the United States, enjoy the benefits of a jurisdictional statute giving them special access to the federal courts, and occupy a place in the structure of our government that justifies allowing them to assert their tax immunity in federal court without first going hat-in-hand to the Attorney General. Having examined this case "in light of [the judges'] governmental role and the wishes of Congress as expressed in relevant legislation," *Federal Reserve Bank*, 499 F.2d at 64, we hold



that Judges Acker and Clemon are eligible for the *Department of Employment* exception, and therefore, that the district court had jurisdiction to hear the case.

## III. CONCLUSION

We have reconsidered our decision in light of *Farm Credit Services*, and hold that under the facts of this case the defendants are eligible for the federal instrumentality exception. Therefore, the TIA does not operate to bar federal jurisdiction, and removal of the case was proper. Accordingly, we REINSTATE our *en banc* opinion on the merits and AFFIRM the district court's ruling.

AFFIRMED; EN BANC OPINION REINSTATED.

ANDERSON, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

Respectfully, I dissent for the reasons set out in my dissent, and Judge Birch's dissent, to the initial *en banc* decision. *Jefferson County v. Acker*, 92 F.3d 1561, 1576-81 (11th Cir.1996).

BIRCH, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

I respectfully dissent for the same reasons set out in the initial *en banc* decision. *Jefferson County v. Acker*, 92 F.3d 1561, 1577-81 (11th Cir.1996). Because I continue to view the tax at issue as nothing more than an income tax on the earnings of citizens who are also federal judges, I cannot agree that the federal instrumentality exception to the Tax Injunction Act applies. Accordingly, I believe the district court is without jurisdiction to hear this case.

CARNES, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

The Supreme Court vacated our prior decision and remanded this case to us "for further consideration in light of *Arkansas v. Farm Credit Services of Central Arkansas*, ___ U.S. ___, 117 S.Ct. 1776, 138 L.Ed.2d 34 (1997)," a decision which applied the Tax Injunction Act, 28 U.S.C. § 1341. When the Supreme Court vacates and remands one of our decisions, the entire case comes back to us and we are free to bring a fresh perspective (and hopefully fresh wisdom) to issues we have already addressed. *See Moore v. Zant*, 885 F.2d 1497, 1502-03 (11th Cir.1989) (en banc). Instead of reinstating our prior decision affirming the district court, we should seize this opportunity to correct our earlier decision.

When this case was last before us, I joined the majority opinion which held that insofar as Jefferson County's occupational tax applies to federal judges it amounts to a tax on federal instrumentalities and violates the intergovernmental tax immunity doctrine. Since then I have been convinced that I was wrong to join that holding. I would like to think that I have become smarter and more learned in the law since our prior decision was issued, but there is no compelling evidence to support such a conclusion as to any member of this Court. My change of view is attributable instead to reading the amicus brief filed by the United States after this case left our Court and while it was before the Supreme Court on a petition for writ of certiorari. Reading that brief (which was incorporated as an appendix into the latest brief Jefferson County filed in this Court) and reflecting upon it, as well



as re-reading some of the authorities cited has convinced me that I was wrong before.

Having finally seen the light, I join Judges Anderson, Birch, and Henderson in concluding that the occupational tax at issue in this case is a tax upon the "pay or compensation" of those to whom it applies, including federal judges. As such it falls within the consent to taxation Congress has given in the Public Salary Act, 4 U.S.C. § 111, and therefore does not violate the intergovernmental tax immunity doctrine. Application of the tax to federal judges is not unconstitutional.

As for the *Farm Credit Services* issue, I do not believe that the federal instrumentality exception to the Tax Injunction Act applies in this case. Accordingly, I would hold that the district court lacked jurisdiction, and I would vacate its judgment and remand with directions to dismiss the case for lack of jurisdiction. Assuming to the contrary that the Tax Injunction Act does not bar this action, I would reverse and remand the district court's judgment on the merits.

**JEFFERSON COUNTY, a political subdivision of the State of Alabama, Plaintiff-Appellant,**

**v.**

**William M. ACKER, Jr., Defendant-Appellee.**

**JEFFERSON COUNTY, a political subdivision of the State of Alabama, Plaintiff-Appellant,**

**v.**

**U.W. CLEMON, Defendant-Appellee.**

**No. 94-6400.**

United States Court of Appeals, Eleventh Circuit.

Aug. 30, 1996.

County brought action against federal judges to recover delinquent privilege taxes. Judges removed case to federal court. The United States District Court for the Northern District of Alabama, Nos. CV93-M-69-S and CV93-M-196-S, Charles A. Moye, Jr., J., granted summary judgment to judges, 850 F.Supp. 1536, and county appealed. The Court of Appeals reversed, 61 F.3d 848. Rehearing en banc was granted. The Court of Appeals, Cox, Circuit Judge, held that: (1) privilege tax violated intergovernmental tax immunity doctrine, and (2) Congress did not consent to tax.

Affirmed.

Anderson, Circuit Judge, filed dissenting opinion, in which Henderson, Senior Circuit Judge, joined.



Birch, Circuit Judge, filed dissenting opinion, in which Henderson, Senior Circuit Judge, joined.

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Appeals from the United States District Court for the Northern District of Alabama.

Before TJOFLAT, Chief Judge, KRAVITCH, HATCHETT, ANDERSON, EDMONDSON, COX, BIRCH, DUBINA, BLACK, CARNES and BARKETT, Circuit Judges, and HENDERSON*, Senior Circuit Judge.

COX, Circuit Judge:

We decide in this case whether Jefferson County, Alabama, may impose on federal judges holding office under Article III of the Constitution[1] a tax for the privilege of engaging in their occupation within the county. We hold that such a tax violates the Supremacy Clause of the Constitution.[2]

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* Senior U.S. Circuit Judge Henderson elected to participate in this decision pursuant to 28 U.S.C. § 46(c).

[1] Article III of the Constitution vests the judicial power of the United States in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. Article III judges include federal district court judges, judges for the circuit courts of appeals, and justices of the Supreme Court.

[2] Given the nature of the question presented in this case, we considered the issue of recusal at the outset. Our discussion of the recusal issue is included as an appendix.

## I. FACTS AND PROCEDURAL HISTORY

Jefferson County, Alabama, sued William M. Acker, Jr., and U.W. Clemon, United States District Judges for the Northern District of Alabama, to recover delinquent county taxes due under Jefferson County Ordinance No. 1120. Ordinance No. 1120 imposes a license or privilege tax (the "privilege tax") on persons not otherwise required to pay any license or privilege tax to the State of Alabama or Jefferson County. The ordinance provides:

> It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the County on or after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2 %) of the gross receipts of each such person.

Jefferson County, Ala., Ordinance No. 1120, § 2 (Sept. 29, 1987).

The ordinance defines "vocation, occupation, calling and profession" to include the holding of any kind of office, by election or appointment, by any federal, state, county, or city officer or employee where the officer's or employee's services are rendered within Jefferson County. *Id.* § 1(C).[3] It is undisputed that the ordinance

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[3] The ordinance also includes the following definition of "vocation, occupation, calling and profession":

> The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal



facially applies to federal judges. Non- residents of Jefferson County performing work in Jefferson County must pay the privilege tax. See *Id.* § 1(B). The ordinance defines "gross receipts," by which it measures the privilege tax, as the total gross amount of all salaries, wages, or other monetary payments of any kind which a person receives or is entitled to receive for work or services. *Id.* § 1(F).[4] If

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> services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following [listing sections of the Code of Alabama].

Ordinance No. 1120, § 1(B).

[4] Ordinance No. 1120, § 1(F) provides:

> The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by

compensation is earned from work both inside and outside Jefferson County, the privilege tax is based on the proportion of work performed within Jefferson County. *Id.* § 3. The computation of the percentage of work done within Jefferson County must be supported by oath. *Id.*

The ordinance requires employers to withhold privilege taxes, to file returns with the Director of Revenue, and to keep and maintain certain records for five years. *Id.* § 4. The Administrative Office of the United States Courts has never withheld Jefferson County privilege taxes from the salary of any federal judge or court employee. Under the ordinance, an employer's failure to withhold the privilege tax does not relieve employees from the obligation to pay. *Id.* An employee whose employer has failed to comply with the ordinance must file a return and pay the privilege tax. *Id.* § 5.

The ordinance grants certain investigative powers to the Jefferson County Director of Revenue. These include the power to examine the books, records, and papers of any employer or licensee to determine the accuracy of any return or to determine the amount of privilege taxes due if no return was filed, as well as the power to examine any person under oath concerning any gross receipts which were or should have been shown in a return. *Id.* § 7. The Director of Revenue also may promulgate regulations for the administration and enforcement of the ordinance. *Id.* § 8.

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his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received . . .



The ordinance imposes interest and penalties for the failure to pay privilege taxes and the failure to withhold privilege taxes. *Id.* § 10(A). In addition, the ordinance alludes to other punishment for failing to comply with its requirements:

> Any person or employee who shall fail, neglect or refuse to pay a license fee . . . or any employer who shall fail to withhold said license fees, or to pay over to County such license fees . . . , or any person required to file a return . . . who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him . . . to examine his books, records and papers for any purpose authorized by this Ordinance . . . shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

*Id.* § 10(B). Alabama law provides that each violation[5] of a city or town ordinance requiring the payment of privilege taxes is punishable by a fine, as prescribed by the ordinance, of up to $500, by up to six months imprisonment, or by both. Alabama Code § 11-51-93 (1989). Alabama law does not appear to provide criminal sanctions for violating county ordinances requiring the payment of privilege taxes.

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[5] Each day one works without a license constitutes a separate offense. Alabama Code § 11-51-93 (1989).

At least three other local governments in Alabama have ordinances requiring the payment of license or privilege taxes. The Cities of Gadsden and Birmingham, in the Northern District of Alabama,[6] and Auburn, in the Middle District of Alabama, have ordinances almost identical to Jefferson County's, though their ordinances tax gross receipts at a higher rate and, because they are city ordinances, are backed by criminal penalties under Alabama law. See *Id.* Counsel for Jefferson County told us at oral argument that Jefferson County simply copied Birmingham's ordinance when enacting Ordinance No. 1120.

Judge Acker and Judge Clemon maintain their principal offices in the Hugo Black Federal Courthouse in Birmingham, Alabama, which lies within Jefferson County. They routinely perform some but not all of their duties outside of Jefferson County. Judges Acker and Clemon have refused to pay the privilege tax imposed by the ordinance. Before the district court's opinion in this case, all other active judges of the Northern District of Alabama paid the privilege tax on differing percentages of their judicial salaries without supporting those percentages by an oath or any formal accounting procedure. In addition, all state judges with offices in Jefferson County have paid the privilege tax based on portions of their salaries.

Jefferson County sued Judge Acker and Judge Clemon in state court to recover delinquent privilege taxes due under the ordinance. Each judge removed his

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[6] The Northern District of Alabama holds court in both Birmingham and Gadsden. 28 U.S.C. § 81 (a)(3) and (6).



case to federal court, where the cases were consolidated. The parties stipulated to the facts and submitted cross-motions for summary judgment.

The district court[7] held that, under the intergovernmental tax immunity doctrine, the ordinance is unconstitutional as applied to Judge Acker and Judge Clemon. The court concluded that the legal incidence of the privilege tax falls on the federal judicial function. *Jefferson County v. Acker,* 850 F.Supp. 1536, 1543 (N.D.Ala.1994). According to the court, the privilege tax, "by express intention and in real effect, is a franchise tax imposed upon the federal judicial operations and is unconstitutional as a direct tax upon an officer and instrumentality of the United States, that is, upon the sovereign itself." *Id.* at 1545-46.

The district court also held that applying the ordinance to Judges Acker and Clemon violates the Compensation Clause of Article III.[8] *Id.* at 1547. The privilege tax diminishes a judge's compensation, rather than taxing his salary, the court held, because its incidence "is upon the performance of judicial functions by a judicial officer, antecedent to the point that the salary therefor having been paid by the government becomes the property of the

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[7] The Honorable Charles A. Moye, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

[8] The Compensation Clause provides that Article III judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

individual citizen of Alabama." *Id.* at 1547-48. Jefferson County appealed.[9]

A panel of this court reversed, holding that the ordinance may be applied to Article III judges without violating the intergovernmental tax immunity doctrine or the Compensation Clause. *Jefferson County v. Acker,* 61 F.3d 848 (11th Cir.1995). Chief Judge Tjoflat dissented. The panel majority disagreed with the district court's conclusion that the ordinance taxes the federal judicial function. The panel majority determined that "the practical effect of [the ordinance] is to tax the income that federal judges derive from the performance of their judicial functions," not "to impose a license tax as a precondition to the performance of those functions." *Id.* at 855. And the panel majority determined that federal judges are federal officers rather than arms of the federal government. *Id.* at 853. Therefore, the panel held, the ordinance does not directly tax the operations of the federal government in violation of the intergovernmental tax immunity doctrine. *Id.* at 856.

Also based on its determination that the practical effect of the privilege tax is that of an income tax, the panel majority held that the Compensation Clause does not bar applying the ordinance to federal judges. *Id.* According to the panel majority, "[i]t is well established

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[9] The district court also held that the ordinance does not discriminate against Judges Acker and Clemon by reason of the federal source of their compensation in violation of the Public Salary Act, 4 U.S.C. § 111. On this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it.



that the Compensation Clause does not forbid . . . levying an income tax on federal judges." *Id.* (citing *O'Malley v. Woodrough,* 307 U.S. 277, 282, 59 S.Ct. 838, 840, 83 L.Ed. 1289 (1939)).

Judges Acker and Clemon filed a suggestion for rehearing en banc. Recognizing this case to involve legal questions and principles of exceptional importance, we granted rehearing en banc to determine whether the ordinance constitutionally may be applied to Article III judges.

## II. ISSUES ON APPEAL

Two issues have been raised on appeal: (1) whether the tax imposed by Ordinance No. 1120 constitutes an unconstitutional diminution in the compensation of Article III judges; and (2) whether the tax imposed by Ordinance No. 1120 violates the Supremacy Clause as an intergovernmental tax. Because we hold that the Supremacy Clause bars the application of the ordinance to federal judges, we do not address whether the ordinance unconstitutionally diminishes federal judges' compensation.

## III. CONTENTIONS OF THE PARTIES

Jefferson County contends that the district court erred in holding that the intergovernmental tax immunity doctrine prohibits imposing the privilege tax on federal judges. Jefferson County argues that the Public Salary Act and the Buck Act waived the tax immunity of federal officers, including federal judges, with respect to all taxes

except discriminatory taxes. Because the privilege tax is not discriminatory, the County argues, it constitutionally may be applied to federal judges.

The County further contends that, even if Congress's waiver of federal tax immunity does not apply to the privilege tax, the intergovernmental tax immunity doctrine bars only those state taxes levied directly on the federal government itself.[10] The privilege tax, the County argues, is not levied directly on the federal government. Rather, it is imposed on individuals, who are employees of the federal government as opposed to its agencies or instrumentalities. The County argues that Judges Acker and Clemon have conceded their tax immunity argument by admitting that they are subject to the Alabama state income tax: if they were instrumentalities of the federal government, tax immunity would shield them not only from the privilege tax but also from state income taxes.

Judges Acker and Clemon contend that Congress has not waived their federal tax immunity from the privilege tax. They argue that the privilege tax violates the intergovernmental tax immunity doctrine because the legal incidence of the privilege tax is not on the individual judge but on the performance of the federal judicial function. The judges contend that a federal judge is the federal court when performing judicial duties. The judges

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[10] The County recognizes that the intergovernmental tax immunity doctrine also bars taxes that discriminate against the federal government. But the dispute on this appeal does not center on whether the privilege tax is discriminatory and, in light of our disposition of the case, we do not address whether the privilege tax is discriminatory.



contend that state law is determinative of the legal incidence of the privilege tax. When state law demonstrates that a tax is levied on a federal function, they argue, the practical effect of the tax need not be considered. Judges Acker and Clemon also argue that the ordinance's onerous time-keeping and return requirements burden the federal judicial function.

## IV. DISCUSSION

We are presented with an issue of first impression. The parties have not cited, and we have not found, any federal case addressing whether the intergovernmental tax immunity doctrine prohibits a state or local government from imposing a privilege tax on Article III judges.

We begin our analysis with an examination of the contours of the intergovernmental tax immunity doctrine, mindful that the nature of the tax and the identity of the taxpayer here differ significantly from the taxes and taxpayers at issue in previous intergovernmental tax immunity cases. Then we apply the doctrine to the judges' challenge to the Jefferson County privilege tax. Finally, we determine whether the Public Salary Act and the Buck Act have altered the intergovernmental tax immunity doctrine's limits on state and local taxation so as to permit the imposition of the privilege tax on federal judges.

### A. *The Intergovernmental Tax Immunity Doctrine*

The purpose of the intergovernmental tax immunity doctrine is to forestall "clashing sovereignty." *United*

*States v. New Mexico,* 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982) (quoting *McCulloch v. Maryland,* 4 Wheat 316, 430, 4 L.Ed. 579 (1819)). Born of Chief Justice Marshall's opinion in *McCulloch v. Maryland,* and aphoristically expressed in Marshall's famous dictum "the power to tax involves the power to destroy," the intergovernmental tax immunity doctrine seeks to reconcile states' sovereign taxing authority with the Supremacy Clause's protection of federal operations from state interference. *See generally New Mexico,* 455 U.S. at 730-36, 102 S.Ct. at 1380-1383; Paul J. Hartman, Federal Limitations on State and Local Taxation §§ 6:1-6:15 (1981). The Supreme Court's attempt to fashion a doctrine accommodating these competing constitutional imperatives "has been marked from the beginning by inconsistent decisions and increasingly delicate distinctions." *New Mexico,* 455 U.S. at 730, 102 S.Ct. at 1380-81.

For over a century, the Supreme Court treated Marshall's famous dictum as a constitutional mandate, *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 489, 59 S.Ct. 595, 602, 83 L.Ed. 927 (1939) (Frankfurter, J., concurring), finding in case after case that nondiscriminatory state taxes potentially affecting the federal government – even taxes imposed on private parties dealing with the government – threatened to disrupt federal operations. The Court thus struck down, for example, state income taxes on federal employees, *Dobbins v. Commissioners of Erie County,* 41 U.S. (16 Pet.) 435, 10 L.Ed. 1022 (1842), and state sales taxes on private companies' sales to the federal government, *Panhandle Oil Co. v. Mississippi ex rel. Knox,* 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928). The theory was that



such taxes might increase the cost to the federal government of performing its functions. *United States v. County of Fresno,* 429 U.S. 452, 460, 97 S.Ct. 699, 703, 50 L.Ed.2d 683 (1977).

The theory that a nondiscriminatory tax unconstitutionally interferes with federal functions simply because it imposes an economic burden on the federal government was abandoned in *James v. Dravo Contracting,* 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937). There, the Court assumed that a state gross receipts tax levied on a federal contractor increased the cost to the government of the contractor's services, but held that the tax nevertheless did not interfere in any substantial way with the performance of federal functions. *Id.* at 160, 58 S.Ct. at 221. Dravo signalled the beginning of the end of constitutional tax immunity for private parties dealing with the federal government. Thus, two years later the Court overruled *Dobbins,* which had immunized federal employees from state income taxes, declaring that any economic burden on the government from an income tax on a government employee is "but the normal incident of the organization within the same territory of two governments, each possessing the taxing power," and a burden "which the Constitution presupposes." *Graves v. New York ex rel. O'Keefe,* 306 U.S. 466, 487, 59 S.Ct. 595, 601, 83 L.Ed. 927 (1939) (*"O'Keefe "*).

The *O'Keefe* Court focused its analysis on whether an income tax on a federal employee obstructs or interferes with the performance of federal functions. *Id.* at 477, 481, 484, 59 S.Ct. at 597, 599, 600. Earlier cases granting immunity from income taxes, the Court said, failed to consider

whether such taxes interfered with government functions; they just assumed that the immunity of the government and its instrumentalities extended to employees of those entities. *Id.* at 481, 59 S.Ct. at 599. But "[t]he theory . . . that a tax on income is legally or economically a tax on its source [was] no longer tenable" after *Dravo*. *Id.* at 480, 59 S.Ct. at 598. Thus not willing to assume any burden on government functions, *Id.* at 486, 59 S.Ct. at 601, the court examined whether an income tax indeed interfered with government functions. The Court found no burden on federal functions other than the economic burden that may be passed on to the government in the form of higher labor costs. *Id.* at 481, 59 S.Ct. at 598. Concluding that such a burden does not amount to an interference with the performance of federal functions, the Court upheld the imposition of state income taxes on federal employees. *Id.* at 487, 59 S.Ct. at 601.

Later cases similarly recognized that the economic burden on the federal government of nondiscriminatory state taxes imposed on those dealing with the federal government generally does not threaten to impede the performance of federal functions. *E.g., South Carolina v. Baker,* 485 U.S. 505, 521, 108 S.Ct. 1355, 1366, 99 L.Ed.2d 592 (1988) (noting that tax's entire financial burden may fall on government without rendering tax unconstitutional); *New Mexico,* 455 U.S. at 734, 102 S.Ct. at 1382 (noting that no immunity arises from federal government shouldering tax's entire economic burden); *County of Fresno,* 429 U.S. at 462, 97 S.Ct. at 704-705 (noting that economic burden on federal function does not render tax unconstitutional). With this recognition, the intergovernmental tax immunity doctrine has become somewhat



more attuned to the practical realities of our federal system. But the test for determining whether a nondiscriminatory tax interferes with the federal government's functions remains highly formalistic.

Current intergovernmental tax immunity doctrine asks whether the "legal incidence," as opposed to the economic burden, of the tax falls directly on the federal government or its instrumentality. *See New Mexico,* 455 U.S. at 735, 102 S.Ct. at 1383; *County of Fresno,* 429 U.S. at 464, 97 S.Ct. at 705. A nondiscriminatory state or local tax is unconstitutional only "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *New Mexico,* 455 U.S. at 735, 102 S.Ct. at 1383. To be an instrumentality of the government, a taxed entity must be "so intimately connected with the exercise of a power or the performance of a duty by the Government that taxation of it would be a direct interference with the functions of government itself." *Id.* (citations and internal quotation marks omitted).

The "legal incidence" test has significantly constricted federal intergovernmental tax immunity. Indeed, the Supreme Court has characterized the current doctrine's prohibition against taxes legally incident on the federal government or its instrumentalities as of "essentially symbolic importance, as the visible 'consequence of that [federal] supremacy which the constitution has declared.' " *New Mexico,* 455 U.S. at 735, 102 S.Ct. at 1383 (quoting *McCulloch v. Maryland,* 4 Wheat. at 436). Relegation of the doctrine to largely symbolic importance is not

surprising in light of the recognition that the economic burden of nondiscriminatory state taxes does not threaten the government's operations. After all, by its very essence, a tax imposes an economic burden. If the Constitution presupposes such an economic burden, then few taxes will violate the intergovernmental tax immunity doctrine.

We do not mean to gainsay the intergovernmental tax immunity doctrine's importance in our federal system. Though it has been narrowed and beset by formalism, the doctrine has continuing vitality. Our point is that the reason for the doctrine's contraction must be appreciated to understand the scope of the doctrine's continuing vitality. The doctrine's contraction stemmed not from a weakening of the principle that, under the Supremacy Clause, states may not burden or interfere with federal operations, but from the recognition that nondiscriminatory taxes levied on private parties generally do not impede federal operations. The intergovernmental tax immunity doctrine still prohibits any state or local tax that burdens or interferes with federal operations.

Mindful of the underlying purpose of intergovernmental tax immunity, the doctrine's history, and the "actual workings of our federalism," *O'Keefe*, 306 U.S. at 490, 59 S.Ct. at 603 (Frankfurter, J., concurring), we turn to whether the Jefferson County privilege tax constitutionally may be levied on Judges Acker and Clemon.



B. *The Federal Judges' Challenge to the Privilege Tax*

Judge Acker and Judge Clemon's challenge to the privilege tax differs substantially from most intergovernmental tax immunity challenges. As far as we can tell, Judges Acker and Clemon are the first federal judges to challenge a state or local tax on intergovernmental tax immunity grounds. Moreover, because the privilege tax differs from most taxes, their objection to the privilege tax is novel. They do not allege that the privilege tax interferes with federal functions by imposing an economic burden on the federal government. The district court found that the privilege tax imposes no economic burden on the federal government itself; it is paid by individual federal judges out of their own pockets. Judges Acker and Clemon do not question this conclusion and, thus, do not make the economic-burden argument that now has been thoroughly repudiated by the intergovernmental tax immunity doctrine.[11]

The burden of which Judges Acker and Clemon complain is the ordinance's requirement that they remit privilege taxes for the privilege of lawfully performing federal judicial duties in Jefferson County. Though they object to paying a tax, they do so not for the economic reasons generally associated with objections to taxes but because the tax purports to be a precondition to the lawful performance of their federal judicial duties.

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[11] Purporting to eschew the economic-burden theory, some litigants have couched their arguments simply in terms of interfering with federal functions, but these challenges invariably have amounted to challenges to the tax's economic burden.

Jefferson County contends that the privilege tax does not regulate, control, or license a federal judge's performance of his duties any more than a state income tax. If Jefferson County is correct that, despite being labelled a "license fee," the privilege tax amounts to an income tax, then it constitutionally may be applied to Judges Acker and Clemon under *O'Keefe*. Thus, before attempting to ascertain the "legal incidence" of the privilege tax under the intergovernmental tax immunity doctrine, we examine the substantive nature of the privilege tax to determine whether it merely taxes the receipt of income.

1. *Whether the Privilege Tax Is In Substance An Income Tax*

To determine the nature and effect of the privilege tax, "we must look through form and behind labels to substance." *City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 492, 78 S.Ct. 458, 460, 2 L.Ed.2d 441 (1958). We are the ultimate arbiters of the substance of the privilege tax. But state law defines the attributes comprising the substance of the privilege tax.

The Alabama Supreme Court has described the operational effect of a City of Auburn ordinance identical to the Jefferson County ordinance in all relevant respects. *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972). Rejecting the argument that the Auburn ordinance imposed an income tax not authorized by the state constitution, Alabama's highest court explained that

> [t]he tax is occasioned when the taxpayer performs services within the Auburn city limits, and not when the taxpayer receives income. Therefore, the ordinance taxes the privilege of working and the engagement of rendering services within the City of Auburn, and it only measures the tax due by the amount of the taxpayers' gross receipts which result from such privilege. . . . It is evident that the tax is not even measured by a person's income, but only by his salary or wages earned. So in no sense can the Auburn tax be considered an income tax.



*Id.* at 837.

Concerned with substance, not labels, we pay no heed to the state court's conclusion that the privilege tax is not an "income tax" under state law. In analyzing the privilege tax's natural effect, however, we accord great weight to the state court's determination of how the tax operates; if the state court's determination is a reasonable interpretation of the ordinance, we deem it conclusive. *See Gurley v. Rhoden*, 421 U.S. 200, 208, 95 S.Ct. 1605, 1610, 44 L.Ed.2d 110 (1975) (deferring to state court's reasonable determination of operating incidence of excise tax).

The Alabama Supreme Court's determination of the operation of the Auburn ordinance is a reasonable interpretation of how the identical Jefferson County ordinance operates. Our examination of the Jefferson County ordinance, within the context of Alabama law, reveals that the privilege tax is a tax on the performance of work in Jefferson County. In substance, the privilege tax does not tax the receipt of income.

The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful

to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Other provisions of the ordinance further demonstrate that the privilege tax does not merely tax the receipt of income. The privilege tax is levied not only on income received but also on income that one is entitled to receive, *id.* § 1(F), indicating that the ordinance is concerned with ensuring that work is taxed regardless of whether income from the work actually is received. Moreover, persons engaged in occupations or businesses for which they are required to pay state or other Jefferson County license fees are exempted from paying the privilege tax under Ordinance No. 1120. *Id.* § 1(B). We do not understand why, if the ordinance is an income tax, it exempts from its requirements persons paying license fees to Jefferson County or to the State of Alabama, license fees that are totally unrelated to income.[12] This exemption makes sense only if the ordinance aims to ensure that a license fee is paid to some unit of government for all work performed in Jefferson County.

We hold that the Jefferson County privilege tax is not, in substance, a tax on income. Though the privilege tax is measured by income, at least roughly, its other attributes remove it from any reasonable conception of an income tax. Therefore, this case is not controlled by

[12] Attorneys, for example, must pay a flat annual license fee of $250 to the state, regardless of their income. Ala.Code § 40-12-49.



*O'Keefe's* holding that income taxes do not interfere with federal functions in violation of the intergovernmental tax immunity doctrine.

2. *The Legal Incidence of the Privilege Tax*

Our determination that the privilege tax does not tax the receipt of income is only the beginning of our inquiry. Regardless of what "type" of tax the privilege tax is, the intergovernmental tax immunity doctrine bars its imposition on Judges Acker and Clemon only if its legal incidence falls directly on the federal government or its instrumentality. *New Mexico,* 455 U.S. at 735, 102 S.Ct. at 1383. Judges Acker and Clemon urge that the privilege tax falls on the federal judicial function, as the district court held. Jefferson County contends that the privilege tax is imposed on individuals, not on the federal government or the federal judicial function.

Identifying the legal incidence of the privilege tax is a question of federal law. *Kern-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 121, 74 S.Ct. 403, 410, 98 L.Ed. 546 (1954). However, as with our-determination of the nature of the privilege tax, determining the privilege tax's legal incidence requires us to identify the substantive characteristics of the privilege tax under state law. *City of Detroit,* 355 U.S. at 493, 78 S.Ct. at 460-61. Then, we must evaluate the substance of the privilege tax under the federal standards for identifying a tax's legal incidence. *Kern-Limerick,* 347 U.S. at 121, 74 S.Ct. at 410.

We hold that the legal incidence of the tax falls on the federal judge. As the Supreme Court seems to apply the

legal incidence test, the legal incidence of a tax falls on the *entity* that the taxing statute identifies as the taxpayer and contemplates paying the tax. *See United States v. State Tax Commission of Mississippi*, 421 U.S. 599, 607-610, 95 S.Ct. 1872, 1877-79, 44 L.Ed.2d 404 (1975); *Gurley*, 421 U.S. at 203-212, 95 S.Ct. at 1608-12; *Kern-Limerick*, 347 U.S. at 113-123, 74 S.Ct. at 406-411. The ordinance identifies the person engaging in work in Jefferson County as the taxpayer and contemplates that he or she will pay the tax.[13] Ordinance No. 1120, §§ 2, 4, 5. Thus, the legal incidence of the privilege tax falls on Judge Acker and Judge Clemon.

3. *Whether Federal Judges Are Federal Instrumentalities*

We must determine, then, whether Judges Acker and Clemon may be considered the federal government or its instrumentalities. The district court concluded that federal judges are federal instrumentalities. Judges Acker and Clemon argue that a federal judge is the federal court when performing judicial duties. Jefferson County argues that Judges Acker and Clemon are individuals and employees of the federal government, not its instrumentalities. According to the County, Judges Acker and Clemon cannot be instrumentalities of the government because, if they were, then they would be immune from state income taxes as well.

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[13] The ordinance imposes withholding requirements on employers, but contemplates that the license fee will be paid by the person engaging in the work.



Judges Acker and Clemon may be instrumentalities of the federal government with respect to the taxation of one activity but not another. *See New Mexico*, 455 U.S. at 740-743, 102 S.Ct. at 1386-87 (suggesting that an entity may be a federal instrumentality when one activity is taxed even if it is not an instrumentality when another activity is taxed). The Supreme Court's description of what constitutes a federal instrumentality suggests that the activity being taxed may determine whether the taxpayer is a federal instrumentality. To be an instrumentality, an entity must be "so closely connected to the Government that the two cannot realistically be viewed as separate entities, *at least insofar as the activity being taxed is concerned*," or "so intimately connected with *the exercise of a power or the performance of a duty* by the Government that taxation of it would be a direct interference with the functions of government itself." *Id.* at 735, 102 S.Ct. at 1383 (citations and internal quotation marks omitted) (emphasis added).

We accept that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge may be no more intimately connected with the federal government when receiving income than the federal employee in *O'Keefe*. The taxation of a federal judge's income may interfere with the functions of government no more than the taxation of any other federal employee's income. But taxing a federal judge in the performance of his or her judicial duties is fundamentally different from taxing his or her income.

When performing federal judicial duties, a federal judge performs "the functions of government itself," *New*

*Mexico*, 455 U.S. at 735, 102 S.Ct. at 1383, and cannot realistically be viewed as a separate entity from the federal court. The judge is "so intimately connected with the exercise of [federal judicial] power or the performance of a [federal judicial] duty . . . that taxation of [him] would be a direct interference with the functions of government itself." *Id.* Thus, we hold that a federal judge is a federal instrumentality when the taxed activity is the judge's performance of judicial duties.

We conclude, then, that the intergovernmental tax immunity doctrine bars the imposition of the Jefferson County privilege tax on Judges Acker and Clemon. The privilege tax taxes the activity of working in Jefferson County. As applied to Judges Acker and Clemon, the privilege tax taxes the performance of federal judicial duties in Jefferson County. When performing their judicial duties, Judges Acker and Clemon must be considered instrumentalities of the federal government. The imposition of the privilege tax on Judges Acker and Clemon, therefore, amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine.

Our conclusion that the Constitution bars levying the privilege tax on Judges Acker and Clemon follows not only from a formal application of the intergovernmental tax immunity doctrine but also from adherence to the doctrine's overarching purpose. The imposition of the privilege tax on federal judges is apt to lead to the clashing sovereignty that the Supremacy Clause seeks to avoid. By its very terms and in practical effect, Ordinance No. 1120 may be applied to federal judges only at the risk of interfering with the operation of the federal judiciary.



According to its plain language, the ordinance makes it unlawful for a federal judge to perform his or her duties in Jefferson County without paying the privilege tax. The County argues that Alabama counties have no power to prosecute anyone criminally for failure to pay the privilege tax.[14] While Alabama counties currently lack the power to impose criminal sanctions for failure to pay the privilege tax, the comfort that this omission provides may be short-lived; the Alabama legislature could of course provide a criminal penalty provision applicable to counties like the provision applicable to cities and towns.[15]

Regardless of whether a county possesses the power under Alabama law to make unlicensed work a crime, a federal judge in Jefferson County who for some reason fails to pay the privilege tax is deemed by Jefferson County to act unlawfully when he performs his judicial duties. We have no doubt that, under the Supremacy Clause, Jefferson County could not enjoin or otherwise prevent a federal judge from performing federal duties. But we believe that the Supremacy Clause protects the federal judiciary not only from outright obstruction but also from a requirement that a federal judge pay a fee to

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[14] The ordinance is not backed by criminal penalties, the County argues, so it is "unlawful" to work without paying the privilege tax only in the sense that it is "unlawful" to refuse to pay any civil debt.

[15] At oral argument, counsel for Jefferson County stated that the County appears to have copied Birmingham's privilege tax ordinance verbatim. Under Alabama law, a city, unlike a county, does have the power to criminally prosecute and punish violators of a license tax ordinance. Ala.Code § 11-51-93.

lawfully perform his or her duties. *See Mayo v. United States*, 319 U.S. 441, 447, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504 (1943) (holding that Supremacy Clause prohibits state from requiring United States to pay privilege tax before executing a function of government); *Johnson v. Maryland*, 254 U.S. 51, 57, 41 S.Ct. 16, 16-17, 65 L.Ed. 126 (1920) (holding that state may not require federal postal employee to obtain state driver's license before performing official duties). Any attempt by a state or local government to tell a federal judge what he or she must do to lawfully perform federal duties offends elemental notions of federal supremacy.[16]

In practice, any attempt to apply Ordinance No. 1120 to federal judges threatens to lead to clashing sovereignty. Enforcement of the privilege tax requirement

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[16] The Supreme Court has described the freedom of the federal courts from state interference, albeit in a different context, in this way:

> It may not be doubted that the judicial power of the United States as created by the Constitution . . . is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that . . . the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application.

*Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318, 328, 34 S.Ct. 333, 335, 58 L.Ed. 621 (1914).



against federal judges risks intrusion into a federal judge's judicial affairs. To determine the amount of a federal judge's privilege tax, Jefferson County must determine what percentage of the judge's duties were performed in Jefferson County. We question whether a state or local government may inquire into precisely how and where a federal judge spends time on judicial duties; even if permissible, such an inquiry is apt to engender intergovernmental conflict. A further source of conflict is the practical effect of the privilege tax[17] on federal judges' willingness to sit or otherwise perform duties in Jefferson County.

We note that, in the performance of federal judicial duties, non-resident federal judges often are called upon to sit in Jefferson County. *United States v. Tokars*, 839 F.Supp. 1578 (N.D.Ga.1993), is just one example. *Tokars* was a federal criminal racketeering prosecution involving allegations that the murder of a young woman in front of her two children was committed by two hitmen hired by her husband, an Atlanta attorney. Atlanta, the case's original venue, was saturated with publicity about the case. To safeguard the defendant's constitutional right to a fair trial, a district judge for the Northern District of Georgia granted the defendant a change of venue and spent five weeks in Birmingham trying the case. Under Ordinance No. 1120, the Atlanta-based federal judge would owe Jefferson County a percentage of her salary because she

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[17] The effect includes the burden of recordkeeping and disclosure requirements.

chose Birmingham as the most appropriate venue where the accused could get a fair trial.[18]

C. *Congressional Consent to State Taxation*

Congress generally has the power to consent to state taxation of federal employees, operations, and instrumentalities. *Mayo*, 319 U.S. at 446, 63 S.Ct. at 1140. Jefferson County argues that Congress, in the Public Salary Act and the Buck Act, consented to all forms of state and local taxation of federal employees, including federal judges. Therefore, we examine whether the Public Salary Act and the Buck Act constitute consent to the imposition of the privilege tax on federal judges. The district court held that, under Article III, Congress may not consent to the imposition of the privilege tax on federal judges. Because we find that Congress did not consent to the imposition of the privilege tax on federal judges, we need not address Congress's power to do so.

1. *Public Salary Act*

The Public Salary Act provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of

[18] When questioned at oral argument about whether the *Tokars* judge owes the privilege tax for trying the case in Birmingham, counsel for Jefferson County replied: "Under ordinance yes, I believe she does, I believe she does."



> Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111. The Public Salary Act does not define the "taxation of pay or compensation for personal service" to which the United States consents. The County contends that Congress consented to the imposition on federal employees of *all* nondiscriminatory state and local taxes, including nondiscriminatory privilege taxes.

We do not interpret the Public Salary Act's consent to state taxation of federal employees' compensation as encompassing the imposition of privilege taxes such as Jefferson County's. The Public Salary Act must be read in light of the uncertain state of the intergovernmental tax immunity doctrine at the time of the Act's enactment. Before the Act was proposed, the Supreme Court held that the federal government could levy nondiscriminatory taxes on the incomes of state employees. *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 811-814, 109 S.Ct. 1500, 1505-06, 103 L.Ed.2d 891 (1989) (describing context of Act's enactment). The primary purpose of the Act was to amend the federal tax code to clarify that the federal income tax applied to the income of all state and local government employees. *Id.* at 811, 109 S.Ct. at 1505. *See also* H.R.Rep. No. 26, 76th Cong., 1st Sess., 3-4 (1939); S.Rep. No. 112, 76th Cong., 1st Sess. 11 (1939).

Congress was concerned, however, that considerations of fairness dictated equal tax treatment of federal and state employees. *Davis*, 489 U.S. at 812, 109 S.Ct. at

1506. The Supreme Court had decided *Dravo* but had not yet held in *O'Keefe* that the intergovernmental tax immunity doctrine does not bar states from taxing the income of federal employees. Thus, Congress entertained doubts about whether states could tax federal employees' income without Congress's consent. *Id.* at 811-812, 109 S.Ct. at 1506. To ensure equal tax treatment of all government employees, therefore, Congress decided to consent to state and local taxation of federal employees' income. *Id.* at 812, 109 S.Ct. at 1506. Congress's consent turned out to be unnecessary; *O'Keefe* was decided before the Act was enacted. *Id.* Congress nevertheless enacted the provision consenting to state and local taxation of federal employees' compensation, effectively codifying the result in *O'Keefe*. *Id.*

The context of the Act's enactment thus reveals that Congress intended to consent to state taxation of federal employees' income to reciprocate for the imposition of the federal income tax on state employees. The Act does not consent to all state taxes on federal employees. We discern no congressional intent to consent to state taxes that in substance are not taxes on income. Thus, we interpret "taxation of pay or compensation for personal service," 4 U.S.C. § 111, to refer to state taxes on income. The Public Salary Act does not alter the intergovernmental tax immunity doctrine; in effect, it just codifies the result in *O'Keefe*. *Davis*, 489 U.S. at 813, 109 S.Ct. at 1506.[19]

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[19] Our interpretation of the Public Salary Act as consenting only to taxes that in substance tax income is not inconsistent with the Third Circuit's decision in *United States v. City of Pittsburgh*, 757 F.2d 43 (3rd Cir.1985). Adopting a broad reading of "taxation of pay or compensation," the Third Circuit held that the Public Salary Act consented to Pittsburgh's levy of a privilege tax on a court reporter's transcript fee income. *Id.* at 47. Unlike the Jefferson County privilege tax, the Pittsburgh privilege tax was in substance a tax on income. The Third Circuit found that, despite its "privilege tax" label, the Pittsburgh tax was "clearly a tax on gross receipts or gross income from the fees." *Id.* Though the Third Circuit did not discuss how it arrived at that conclusion, our examination of the Pittsburgh ordinance reveals that the ordinance did not include the factors that distinguish the Jefferson County ordinance from an income tax. *See* Pittsburgh, Pa., Ordinance No. 675 (Dec. 27, 1968).



2. *The Buck Act*

The County also contends that Congress consented to taxes such as the Jefferson County privilege tax in the Buck Act, 4 U.S.C. §§ 106-110. The Buck Act provides in relevant part:

> No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. § 106(a). Unlike the Public Salary Act, the Buck Act defines the state taxation to which the United States consents. The Buck Act defines "income tax" as "any tax

levied on, with respect to, or measured by, net income, gross income, or gross receipts." *Id.* § 110(c).

The district court found that the privilege tax falls within the Buck Act's definition of an "income tax" because the privilege tax is measured by gross receipts. We agree that the Buck Act's definition of "income tax" encompasses the privilege tax. But another provision of the Buck Act removes the privilege tax from the Buck Act's consent to state taxes. Echoing the intergovernmental tax immunity doctrine's prohibition against state taxes levied directly on the federal government, the Buck Act provides that its provisions "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof." *Id.* § 107(a). According to the Supreme Court, "[t]his section can only be read as an explicit congressional preservation of federal immunity from state . . . taxes unconstitutional under the immunity doctrine announced by Mr. Chief Justice Marshall in *McCulloch v. Maryland*." *State Tax Commission of Mississippi*, 421 U.S. at 612, 95 S.Ct. at 1880. Therefore, the Buck Act does not alter the intergovernmental tax immunity doctrine or constitute consent to the privilege tax.

Indeed, the Buck Act's effect on the ability of states to tax federal employees is much more modest than Jefferson County suggests. According to its plain language, the Buck Act merely precludes a taxpayer from arguing that a state or locality lacks jurisdiction to tax her because she resides in a federal area or receives income from transactions or services in a federal area. 4 U.S.C. § 106(a). The Buck Act equalizes taxing power within and without federal areas, allowing states and localities to



levy taxes within federal areas "to the same extent and with the same effect" as without federal areas. *Id.* The Buck Act does not, however, affect the limits on state and local taxing power in any other way.[20]

The Supreme Court addressed the effect of the Buck Act on state and local taxation within federal areas in *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953). In *Howard*, employees of a naval ordnance plant located on federal land in Louisville, Kentucky, challenged the City of Louisville's attempt to collect from them a license fee for the privilege of working in Louisville. *Id.* at 625, 73 S.Ct. at 466. The Supreme Court noted that the United States had exclusive jurisdiction over the federal area, except as modified by statute. *Id.* at 627, 73 S.Ct. at 467. The Court held that the license fee was an "income tax"

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[20] The Buck Act was enacted in 1940 against the background of the just-enacted Public Salary Act. The Public Salary Act's consent to state income taxes failed to reach federal employees residing and working in federal areas because, without congressional consent, the states lacked jurisdiction to tax transactions occurring in federal areas. *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 309 (3rd Cir.1976); *United States v. City and County of Denver*, 573 F.Supp. 686, 691 (D.Colo.1983) (citing S.Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940)). The Buck Act therefore was enacted to eliminate the disparity between the income tax liability of federal employees within federal areas and those outside federal areas. *Lewisburg Area Sch. Dist.*, 539 F.2d at 309; *City and County of Denver*, 573 F.Supp. at 691. It does so by eliminating immunity based solely on the ground that the taxpayer resides in a federal area or receives income from transactions or services in a federal area. The Act does not affect claims of tax immunity based on other grounds. *See* S.Rep. No. 1625, 76th Cong., 3d Sess. 2-3 (1940).

under the Buck Act, *id.* at 629, 73 S.Ct. at 468, and that the Buck Act therefore granted Louisville the right to impose the license fee on the federal employees working at the ordnance plant. *Id.* at 628, 73 S.Ct. at 467. The Court explained, "By virtue of the Buck Act, the tax can be levied and collected within the federal area, just as if it were not a federal area." *Id.* at 629, 73 S.Ct. at 468.

The County suggests that the Buck Act authorizes Jefferson County to levy its license fee on federal judges just as the Buck Act was held in *Howard* to authorize Louisville to levy its license fee on federal employees of the ordnance plant. The challenge to the Jefferson County privilege tax, however, differs significantly from the challenge in *Howard*. Judges Acker and Clemon do not contend that Jefferson County may not tax them because they work within a federal area. Rather, they argue that, regardless of where in Jefferson County they perform their duties, Jefferson County may not levy the privilege tax on them because to do so would amount to a direct tax on instrumentalities of the federal government in violation of the intergovernmental tax immunity doctrine. The federal employees in *Howard*, in contrast, did not contend that the license fee directly taxed the federal government. They challenged the license fee solely on the one ground barred by the Buck Act – that Louisville lacked jurisdiction to tax in a federal area – and the Supreme Court addressed only that ground. Thus, *Howard* does not address the issue presented here.

Nothing in *Howard* undermines our conclusion that the Buck Act does not alter the intergovernmental tax immunity doctrine's limits on state and local taxation.



*Howard* cannot be read, for example, as an implicit rejection of intergovernmental tax immunity from privilege taxes falling within the Buck Act's definition of "income tax." An intergovernmental tax immunity challenge, if raised by the *Howard* employees, would have failed not because the Buck Act precluded such a challenge but because the Louisville license fee did not amount to a direct tax on the federal government or its instrumentalities. Assuming that the taxed activity was working in Louisville, the *Howard* employees could not be considered the federal government or its instrumentalities when performing their duties. Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties; they are not "intimately connected with the exercise of a power or the performance of a duty by the Government." *New Mexico*, 455 U.S. at 736, 102 S.Ct. at 1383. Thus, that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges.

## V. CONCLUSION

As applied to federal judges, the privilege tax violates the intergovernmental tax immunity doctrine as a direct tax on the federal government or its instrumentalities. We hold, therefore, that the Supremacy Clause prohibits Jefferson County from applying Ordinance No. 1120 to Judges Acker and Clemon.

AFFIRMED.

ANDERSON, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

I also dissent for the several reasons set forth by Judge Birch. I can discern no principled way to avoid the conclusion that the instant county ordinance is in substance an income tax for purposes of federal law. I respectfully submit that the majority's attempt to distinguish *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953), is flawed. In *Howard*, the Supreme Court interpreted the Buck Act's provision that no person shall be relieved from liability for state or local income tax by reason of residing on federal property or working on federal property. 4 U.S.C.A. § 106(a). The Supreme Court held that an almost identically worded ordinance was in substance an income tax. The majority attempts to distinguish *Howard* by pointing to the exclusion provision in the Buck Act – i.e. that the Buck Act shall not be deemed to authorize taxation of the "United States itself or any instrumentality thereof." 4 U.S.C.A. § 107(a). Although the majority correctly points out that this provision confirms the continued applicability of the intergovernmental tax immunity doctrine, the majority's attempted distinction fails to recognize that an *income tax* is clearly not barred by the tax immunity doctrine and that the Buck Act and *Howard* indicate that the instant ordinance *is* in substance an income tax.

Having concluded that the instant tax is as a practical matter an income tax, it follows that it is not barred by the intergovernmental tax immunity doctrine because tax



upon the income of a federal employee, however important the position,[1] is not a tax upon the United States or an instrumentality thereof.[2] The test is whether the tax obstructs or interferes with the performance of the federal function. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477, 481, 484, 59 S.Ct. 595, 597, 598-99, 600, 83 L.Ed. 927 (1939). As Judge Birch persuasively points out, the instant tax neither obstructs nor interferes with the performance of the judge's functions. Indeed, the district court so found.

I respectfully dissent.

BIRCH, Circuit Judge, dissenting, in which HENDERSON, Senior Circuit Judge, joins:

I respectfully dissent. The linchpin of the majority opinion is that the tax at issue in this case is something other than an income tax.[1] If the tax at issue is a tax on

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[1] Because the instant tax is an income tax, and because a state or local tax upon a federal judge's income is not barred by the intergovernmental tax immunity doctrine, I need not address the majority's assertion that the acts of federal judges (in performing their official duties) are acts of the United States or an instrumentality thereof.

[2] As Judge Birch points out so forcefully, the majority acknowledges this.

[1] Throughout the majority opinion, Judge Cox is steadfast and candid in acknowledging that should this tax be a tax on income, it would not run afoul of the Supremacy Clause and the intergovernmental tax immunity doctrine predicated thereon, to wit:

> But "[t]he theory . . . that a tax on income is legally or economically a tax on its source [was] no longer

tenable" after *[James v.] Dravo* [*Contracting*, 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155 (1937)]. [*Graves v. New York ex rel. O'Keefe*, 306 U.S. 466] at 480, 59 S.Ct. [595] at 598, 83 L.Ed. 927 [(1939)].

Maj.Op. at 3359.

* * *

If Jefferson County is correct that, despite being labeled a "license fee," the privilege tax amounts to an income tax, then it constitutionally may be applied to Judges Acker and Clemon under *O'Keefe*.

Maj.Op. at 3361.

* * *

We have no doubt that a federal judge is not an instrumentality of the federal government when the activity being taxed is the judge's receipt of income. A judge is no more intimately connected with the federal government when receiving income than the federal employee in *O'Keefe*. The taxation of a federal judge's income interferes with the functions of government no more than the taxation of any other federal employee's income.

Maj.Op. at 3364.

* * *

Congress . . . enacted the provision [4 U.S.C. § 111, The Public Salary Act] consenting to state and local taxation of federal employees' compensation, effectively codifying the result in *O'Keefe*. [*Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 at 812, 109 S.Ct. 1500 at 1506, 103 L.Ed.2d 891 (1989)].

Maj.Op. at 3367.

* * *

We discern no congressional intent to consent to state taxes that in substance are not taxes on income. Thus, we interpret "taxation of pay or compensation



income, as defined by federal law,[2] the judges must pay

for personal service," 4 U.S.C. § 111, to refer to state taxes on income.

*Id.*

* * *

We agree that the Buck Act's [4 U.S.C. §§ 106-110] definition of "income tax" encompasses the privilege tax.

Maj.Op. at 3368.

[2] In *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir.1985), the Third Circuit, in adjudicating a challenge by the United States to the taxation of an official court reporter working in the federal district court (who the panel found to be an officer of the court), observed:

The United States contends, however, that section 111 does not apply because the City's tax is not a tax on compensation. It argues that the section applies only to income taxes, and that because the business privilege tax is not a net income tax, it is not tax on compensation within the meaning of section 111. For support, it cites *F.J. Busse Co. v. City of Pittsburgh*, 443 Pa. 349, 353, 279 A.2d 14, 16 n. 1 (1971), which held that the City's business privilege tax is not an earned income tax under Pennsylvania law. However, *the question of whether Congress consented to the imposition of the business privilege tax is a question of Congressional intent, and therefore determined with reference to federal law. See Howard v. Comm'rs of the Sinking Fund*, 344 U.S. 624, 628-29, 73 S.Ct. 465, 467-68, 97 L.Ed. 617 (1953) (determination of what is an income tax under the Buck Act is a question of federal law).

Congress, in enacting section 111, intended that "[federal employees] should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits

which are accorded to persons engaged in private occupations." S.Rep. No. 112, 76th Cong. 1st Sess. 4 (1939). A broad reading of the meaning of "taxation on . . . compensation" would comport with that intent. Further, in enacting the Public Salary Tax Act of 1939, Congress was aware that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes. S.Rep. No. 112, 76th Cong. 1st Sess. 6-10 (1939). In this case, the City's tax is clearly a tax on gross receipts or gross income from the fees. We believe that the City's business privilege tax in this case is within the language and intent of section 111.

* * *

We therefore hold that if there were any federal constitutional immunity from the imposition of the City's business privilege tax on a federal court reporter's transcript fee income, that immunity was waived by Congress.

(emphasis added). The majority opinion attempts to distinguish this case from the instant case in footnote 1 on page 3364 of its opinion.

The majority professes not to be bound by the Alabama Supreme Court's *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So.2d 833 (1972) conclusion that the privilege tax is not an "income tax," Maj.Op. at 3362, yet, in the next sentence the majority asserts " . . . if the state court's determination is a reasonable interpretation of the ordinance, we deem it conclusive. *See Gurley v. Rhoden*, 421 U.S. 200, 208, 95 S.Ct. 1605, 1610 [, 44 L.Ed.2d 110] (1975)." However, *Gurley* had nothing to do with the determination of whether a state tax was an income tax for the purpose of *federal* law. Moreover, the Supreme Court expressly accorded great weight to the state court's findings regarding the legal incidence of a state tax strictly within the context of state law. *Gurley*, 421 U.S. at 208, 95 S.Ct. at 1610.



the $668.00 per year that the county has levied.[3] Despite the conclusion of the majority that this tax "may be applied to federal judges only at the risk of interfering with the operation of the federal judiciary," Maj.Op. at 3364, the independence of the federal judiciary surely will survive such a tax; as Justice Oliver Wendell Holmes (joined by Justice Louis O. Brandeis) observed:

> To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of [Article III, § 1] of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.

[3] The annual salary of a federal district judge is established by law and is currently $133,600. *See* 28 U.S.C. §§ 135, 461 (1993). Applying the one-half percent privilege tax, an annual tax of $668.00 would result. It is indeed sobering to reflect upon the expenditure of taxpayers' dollars involved in the resolution of the issue before this court. The legal fees and time expended by Jefferson County in order to recover these relatively paltry amounts should be distressing enough to that county's citizens. However, considering the expenditure of federal judicial resources (a district judge's initial consideration, a three-judge panel of this court, and now an *en banc* consideration by twelve judges of our court) one can only wonder if the principle at issue here is really all that significant. Common sense whispers to me that this is the classic tempest in a teapot involving more the clash of powerful egos rather than powerful principles. The outcome of this issue may dent the coffers of Jefferson County or a few federal judges but will speak little to the separation-of-powers principle used to justify this considerable expenditure of public resources.

*Evans v. Gore*, 253 U.S. 245, 265, 40 S.Ct. 550, 557, 64 L.Ed. 887 (1920) (Holmes J., dissenting). I continue to maintain that the Jefferson County tax is not a direct tax on the federal judiciary, but is an individualized tax on the *earnings* of judges and all others subject to the ordinance. Although Article III judges together compose the federal judiciary, they are also citizens of the country, state and localities where they reside. As emphasized by the Supreme Court in *O'Malley v. Woodrough*, 307 U.S. 277, 59 S.Ct. 838, 83 L.Ed. 1289 (1939):

> To suggest that [the income tax] makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

*Id.* at 282, 59 S.Ct. at 840 (footnote omitted).

There is currently no issue before this court that suggests that the privilege tax in this case discriminates against federal employees. The original panel opinion addressed that issue and concluded that the occupational tax does not discriminate unconstitutionally against federal employees. *Jefferson County v. Acker*, 61 F.3d 848, 852-53 (11th Cir.1995), *vacated and rehearing en banc granted*, 73 F.3d 1066 (11th Cir.1996). As noted above, the dispositive issue is whether this tax is an income tax under *federal* law. In a case addressing the issue of intergovernmental tax immunity the Supreme Court admonished:



> [I]n passing on the constitutionality of a state tax "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Commission*, 286 U.S. 276, 280, 52 S.Ct. 556, 557, 76 L.Ed. 1102. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to substance.

*City of Detroit v. Murray Corp. of Amer.*, 355 U.S. 489, 492, 78 S.Ct. 458, 460, 2 L.Ed.2d 441 (1958). In this case, the majority concedes that "[t]he district court found", and "Judges Acker and Clemon do not question", "that the privilege tax imposes no economic burden on the federal government itself; it is paid by individual federal judges out of their own pockets." Maj.Op. at ___; *see also Jefferson County v. Acker*, 850 F.Supp. 1536, 1544 (N.D.Ala.1994), *rev'd*, 61 F.3d 848 (11th Cir.1995), *vacated and reh'g en banc granted*, 73 F.3d 1066 (11th Cir.1996). Yet the majority concludes that the tax at issue is not one on income.

The Supreme Court previously has upheld an analogous ordinance, also denominated as a "license fee" by the state, as a constitutionally sound income tax. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S.Ct. 465, 97 L.Ed. 617 (1953). In *Howard*, the City of Louisville, Kentucky, enacted an ordinance collecting a "license tax

for the privilege of working in the city, measured by one percent of all salaries, wages and commissions earned in the city." *Id.* at 625, 73 S.Ct. at 466. Federal employees working within the jurisdiction of the Navy Department contended that the tax impermissibly functioned as a fee for doing business with the United States. The Supreme Court, however, held that the tax established by the ordinance was an income tax. Quoting the Buck Act, 4 U.S.C. §§ 105-110, the Court stated that an " 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." *Id.* at 628, 73 S.Ct. at 467. Although the state court had held that the tax was not an income tax, the Court declared:

> [T]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts. . . . We hold that the tax authorized by this ordinance was an income tax within the meaning of the federal law.

*Id.* at 628-9, 73 S.Ct. at 468 (emphasis in original). It seems to me that the Supreme Court's reasoning and disposition in *Howard* are very instructive, if not binding, with respect to this case. The majority attempts to minimize the precedential force of *Howard* by distinguishing employees of a naval ordinance [sic] plant who "can be viewed as separate entities from the federal government when performing their duties" from federal judges because the latter are " 'intimately connected with the exercise of a power or the performance of a duty by the Government.' " Maj.Op. at ___ (quoting *United States v.*



*New Mexico*, 455 U.S. 720, 738, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982)). In *Howard*, however, the Supreme Court explicitly concluded that the tax in question – which was defined in terms identical to the tax at issue in this case – was an income tax within the meaning of the Buck Act. 344 U.S. at 468, 73 S.Ct. at 468. The Court's finding that the tax was an income tax under the Buck Act was inextricably linked to its conclusion that individuals working in a federal area within Louisville were subject to the tax. I believe that the Buck Act and the Supreme Court's interpretation thereof compel the conclusion that the Jefferson County tax, which is by its terms indistinguishable from the tax described in *Howard*, is an income tax to which federal judges in Jefferson County are subject.

The majority, relying principally on Alabama's characterization of the tax and distinguishing *Howard* in a manner that fails to explain the Supreme Court's equation of a license occupation tax with an income tax, concludes "[i]n substance, the privilege tax does not tax the receipt of income." Maj.Op. at ___. Focusing on two provisions of the ordinance, the majority concludes that the "tax does not *merely* tax the receipt of income." *Id.* First, the majority notes that the tax is levied not only on income received but also on income that one is entitled to receive. This tax concept is certainly not novel in the realm of *income* taxation, either state or federal. *See In re Kochell*, 804 F.2d 84, 85 (7th Cir.1986) (stating that "in tax law a payment attributable to a person's earnings that bypasses him and goes to his designees is taxed as a payment to him"); *Bank of Coushatta v. United States*, 650 F.2d 75, 77

(5th Cir. Unit A 1981) (noting that "[a] taxpayer is considered in constructive receipt of income if it is available to him without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is made, and the Commissioner will assess taxes on the basis of this income. . . . ") The majority posits that this provision demonstrates that "the ordinance is concerned with ensuring that work is taxed regardless of whether income from the work is actually received." Maj.Op. at ___. While such an explanation is not incredible, it is more likely that the traditional and typical rationale for the taxation of entitlement to income noted above is more plausible.

The majority concludes that because the ordinance exempts persons paying license fees to Jefferson County or to the State of Alabama, it "makes sense only if the ordinance aims to ensure that a license fee is paid to some unit of government for all work performed in Jefferson County." *Id.* An equally plausible explanation is that the exemption exists to prevent double taxation of wage earners in that jurisdiction – particularly when the other qualifying fees may also be computed on the receipt or entitlement from wage or fee income. The deduction or exemption of state and local taxes relative to each other or to federal taxable income is a familiar tax mechanism. *See* 26 U.S.C. § 164(a)(1), (2) and (3) (1988) and Ala.Code § 40-18-15 (1993).



If the burden or interference of the tax is not economic,[4] what is it? The majority informs us that the complaining judges refuse to pay the tax "because the tax *purports* to be a precondition to the *lawful* performance of their federal judicial duties", Maj.Op. at ___ (emphasis added), and holds "that a federal judge is a federal instrumentality when the taxed activity is the judge's performance of judicial duties". *Id.* at ___. Nowhere in the opinion do we find an explanation of just how this declaration of lawful precondition "impedes" or "burdens" the performance of any judicial duties. To paraphrase a popular question posed during the 1980's in fast food advertising: "Where is the 'burden' "? Aside from offending the sensibilities of these affected judges and arousing a sense of apprehension, the ordinance is a paper tiger. As the majority concedes, "Alabama law does not appear to provide criminal sanctions for violating county ordinances requiring the payment of privilege taxes." Maj.Op. at ___. While one can appreciate that these judges, honorable men and women sworn to uphold the law, may feel

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[4] *See* Computation of the tax set out in footnote 3 of this dissent. Recall that the district court found as a matter of fact that the privilege tax imposes no "monetary (economic) burden on the Federal Government itself." *Acker*, 850 F.Supp. at 1544. Moreover, there has been no analysis of facts or finding by the district court relative to the judges' contention that "the ordinance's onerous time-keeping and return requirements burden the federal judicial function." Maj.Op. at ___. Stated differently, there is nothing in the record before us to establish or substantiate any such conclusion. Moreover, this ordinance's recordkeeping and return requirements appear to be no more onerous than those commonly associated with paying one's federal and state income taxes.

uncomfortable acting "unlawfully" as the ordinance "purports" to characterize their work in the absence of payment of the tax, is that the degree of impediment or burden required to invoke application of the intergovernmental tax immunity doctrine and the Supremacy Clause of the United States Constitution? I doubt it. The burden or impediment, to the extent that one exists in this case is, at best, *de minimis* or ephemeral.

## Appendix

BY THE COURT:

### ON RECUSAL

We accepted the Appellee's suggestion for rehearing *en banc* of this case to determine the validity, as applied to Article III judges, of a Jefferson County tax imposed on persons working in the County. Given the nature of the controversy, we, at the outset, had to decide whether some or all judges of this Court are disqualified from the case, where nine of the *en banc* panel's twelve judges have sat in Jefferson County at least one day – and some a few days more. We also faced the fact that, though this court has no immediate sittings planned for Jefferson County, all of its judges could be sent to do judicial work in Birmingham (which is in Jefferson) in the future. Counsel for the County, however, represented at oral argument that the county has "never" attempted to collect the tax from a federal judge with no chambers in Jefferson County. And, no judge of this Court now keeps chambers in Jefferson County. Nor does this Court maintain a courtroom for its use in Jefferson County.



Appellees included in their Certificate of Interested Persons this phrase: "each Judge of the United States Circuit Court of Appeals for the Eleventh Circuit who has within the last five years performed or may perform any work or duties relating to the judicial function at any office or other location within Jefferson County, Alabama."[1] No motions to recuse have been presented. This listing might be construed as a suggestion of recusal; but in any event, whether 28 U.S.C. § 455 requires recusal is an issue that judges are required to resolve on their own motion. *See Phillips v. Joint Legislative Committee on Performance and Expenditure Review of State of Mississippi*, 637 F.2d 1014, 1020 n. 6 (5th Cir. Unit A 1981). Because the integrity of the judiciary is in issue, moreover, the issue should be resolved "at the earliest possible opportunity." *Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 712 (7th Cir.1986).

Whether a judge is disqualified, that is, must not take part in deciding a case, is a question of law. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1260 (5th Cir.1983). Title 28 U.S.C. § 455 requires recusal whenever a judge's impartiality "might reasonably be questioned," *id.* § 455(a), or when he "has a financial interest in the subject matter in controversy . . . or any other interest that could be substantially affected by the outcome of the proceeding." *Id.* § 455(b)(4). The statute defines "financial

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[1] The significance of the five-year figure is unclear. We assume, for purposes of this opinion only, that no statute of limitations has run that would prevent the collection of taxes imposed based on the 9 October 1990 *en banc* sitting, in which most of the present Court heard argument in Jefferson County.

interest" to mean "ownership of a legal or equitable interest, however small . . . in the affairs of a party. . . ." *Id.* § 455(d)(4).

The Ordinance may arguably authorize Jefferson County to compel the payment of half of one percent of the income received for those days worked in the County. So, for example, for those judges who sat in Birmingham on 9 October 1990 – the last day the Court of Appeals has sat in Birmingham and the only day most of our judges have sat in Jefferson County – the Ordinance might mean they could be assessed for half of one percent of 1/365 of their salary for 1990, which comes to roughly a dollar and a half. We doubt the reasonable observer would think the integrity of federal judges could be bought so cheaply.

We looked at the two potential "interests" of the court's judges, in accordance with 28 U.S.C. § 455(b)(4) – financial interests and "other" interests. Considering the statutory definition of "financial interest," the term may be totally inapplicable here; but we do not rely on a strict reading. In *In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir.1980), the court wrote these words:

> We agree with the Fourth Circuit's determination that a remote, contingent benefit, such as a possible beneficial effect on future utility bills, is not a "financial interest" within the meaning of the statute. It is an "other interest," requiring disqualification under a "substantially affected" test.

*Id.* (citing *In re Virginia Elec. & Power Co.*, 539 F.2d 357 (4th Cir.1976)). That case involved an antitrust claim alleging



that various oil companies were fixing the price of natural gas at the well head. Relief was sought, among other things, on behalf of a class of residential customers in New Mexico where all the federal judges of the District of New Mexico resided. The Tenth Circuit held that the possible beneficial effect on the future utility bills of those judges was a remote and contingent benefit and, thus, was no "financial interest." Rather, the interest was an "other interest" which would require disqualification only if the interest "could be substantially affected by the outcome of the proceeding." The possible beneficial effect on future rates was found to be remote and contingent, because, among other things, the rate setting agency might not pass on the cost savings to consumers. *Accord In re Virginia Elec. & Power Co.*, 539 F.2d 357, 366-67 (4th Cir.1976).

We agree with the Tenth and Fourth Circuits that the term "financial interest" is limited to *direct* interests and does not include remote or contingent interests. We believe that the judges' interest in this case is even more remote and contingent than in the Tenth and Fourth Circuit cases. Jefferson County has represented that its tax has never been assessed against a federal judge without chambers in Jefferson County, and no judge of this Court maintains chambers in Jefferson County. Some judge of this Court might occasionally sit in Jefferson County as a member of a three-judge district court; but these duties are not common. Moreover, the possibility that a particular judge of this Court will be specially assigned in the future to hear a case in Jefferson County is wholly speculative. Considering the low expectancy – regardless of how this case might be decided – that the

tax will be assessed against judges who have no chambers or courtroom in Birmingham, we have concluded that the judges of this Court have no "financial interest" in the subject matter in controversy in this case.

Having determined that the judges' interest in this case is not a "financial interest," but is an "other interest," disqualification is required only if the interest "could be substantially affected by the outcome of the proceeding." We readily conclude that this provision does not require recusal. It is unlikely that the tax will ever be assessed against a judge of this Court because none have chambers in Jefferson County. And even if the tax were assessed against non-resident judges, we do not believe the "substantially affected" standard would be satisfied. Special assignments to sit in Birmingham are uncommon, and any such assignment would probably be of short duration and thus give rise to a de minimis tax.[2]

Our conclusion and reasoning is supported by opinions of the Codes of Conduct Committee of the Judicial

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[2] For the same reasons, we also conclude that no one could reasonably question the impartiality of the judges of this Court. We also have considered whether non-financial interests in the case's outcome might require recusal of judges. We concluded that the potential administrative burdens and intrusiveness of the Ordinance (again viewed against the likelihood of no tax ever being assessed against a judge now on this court) did not require recusal. For cases finding no need to recuse for non-financial interests tied to the Article III function, see *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.1984); *Duplantier v. United States*, 606 F.2d 654, 662-63 (5th Cir.1979).



Conference of the United States. The committee has interpreted language in the Code of Conduct for United States Judges in a similar way (the Code's words track closely the financial interest language of section 455). *See generally Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 715 (7th Cir.1986) ("In matters of judicial ethics we are bound to give some weight to the view of the committee of judges that the Judicial Conference of the United States has established to advise federal judges on ethical questions."). In its Advisory Opinion No. 62, the committee advised that a judge should recuse from a case involving a utility to which he was a ratepayer only if he stood to receive savings that "might reasonably be considered substantial." The committee has also advised, in the same context, that a potential billing increase of "60 cents per month as of 1984 plus normal increases is not considered substantial." *Guide to Judiciary Policies and Procedures*, Vol. II, Ch. V, Compendium § 3.1-7[1](c) (1995).

Our decision to go forward with deciding the case was confirmed by the "rule of necessity," which rule "requires that 'where all are disqualified, none are disqualified.' " *In re City of Houston*, 745 F.2d 925, 930 n. 9 (5th Cir.1984) (quoting *Pilla v. American Bar Ass'n*, 542 F.2d 56, 59 (8th Cir.1976)). *See generally United States v. Will*, 449 U.S. 200, 217-19, 101 S.Ct. 471, 482, 66 L.Ed.2d 392 (1980) (section 455 was not intended to abridge rule of necessity). Applying the rule, this court has held that where a case is framed as one that "involves important Article III concerns" of interest to "*all* Article III judges, wherever located," the rule of necessity instructs judges to refrain from recusal. *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1266 (11th Cir.1984).

Also, this court held in *Duplantier v. United States*, 606 F.2d 654, 662-63 (5th Cir.1979) (considering constitutionality of Ethics in Government Act provisions requiring filing of personal financial reports by judges), that where all members of the judiciary have some interest in the outcome, none are disqualified, even if the levels of interest of individual judges vary somewhat. *See id.* at 662 (noting specific characteristics of interest of judges who had already filed reports). Every United States circuit judge in the country is eligible to be sent to Jefferson County to do judicial work. *See* 28 U.S.C. § 291 (assignment of circuit judges); *see also id.* § 292 (assignment of district judges). So, this case is one that involves concerns of some importance to Article III judges everywhere.[3] Thus, recusal by any one judge of this court would be contrary to the rule of necessity.

Also relevant to the recusal decision and to the application of the rule of necessity was the hardship to the participants and hindrance to judicial economy that would have resulted from a recusal *en masse*. In *City of Houston*, 745 F.2d at 931 n. 9, the court noted that recusal was inappropriate when viewed in the light of the "impracticality and unnecessary hardship that would result from recusal where the grounds are tenuous at best. . . . " *Id.* (citations omitted); *see also id.* (noting relevance of "great inconvenience to the counsel, parties,

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[3] The principles involved in this case also might affect the application of other taxes to which other federal judges in other places are subject. *See In re Pet. To Inspect & Copy Grand Jury Materials*, 735 F.2d 1261, 1266-67 (11th Cir.1984) (applying rule of necessity where principles of law involved in case are of substantial interest to all Article III judges).



or judge") (internal quotation marks and citations omitted). Here, recusal would have been especially impractical, because it would have entailed empaneling an entire *en banc* court of judges sitting by designation, an event for which we can find no clear precedent and which raises some jurisprudential questions.[4]

Because we have no interest, financial or other, that requires disqualification under the circumstances and because disqualification under the circumstances would also be contrary to the rule of necessity, we concluded that no member of this court was required to recuse.

ALL THE JUDGES CONCUR IN THE OPINION ON RECUSAL.

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[4] For background, see *United States v. Nixon*, 827 F.2d 1019, 1021 (5th Cir.1987); see also *Matter of Skupniewitz*, 73 F.3d 702, 705 (7th Cir.1996); *Martinez v. Winner*, 778 F.2d 553, 555 n. 1 (10th Cir.1985), *vacated on other grounds, Tyus v. Martinez*, 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 333 (1986).

Our conclusion for this case would be the same even if it were plainly lawful to empanel an *en banc* court for this Circuit composed of non-disqualified judges drawn exclusively from other circuits; the rule of necessity has been applied, by one court at least, even where fewer than all judges of a single district court would be disqualified. *See City of Houston*, 745 F.2d at 931 n. 9 (applying the rule of necessity where "no resident Houston district judge would be qualified if [the pertinent district judge] were held to be disqualified;" district included cities in which district judges were resident other than Houston).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

| | | |
|---|---|---|
| JEFFERSON COUNTY, a Political subdivision of the State of Alabama, | : | |
| Plaintiff, | : | 93-M-0069-S |
| v. | : | |
| WILLIAM M. ACKER, JR., | : | |
| Defendant. | : | 93-M-0196-S |
| JEFFERSON COUNTY, a Political subdivision of the State of Alabama, | : | |
| Plaintiff, | : | |
| v. | : | |
| U. W. CLEMON, | : | |
| Defendant. | : | |

**ORDER**

(Entered Mar. 31, 1994)

These actions come before the Court on cross-motions for summary judgment, as well as certain procedural motions. They were filed in the District Court of Jefferson County, Alabama, seeking to recover taxes allegedly due plaintiff by defendants pursuant to Jefferson County Ordinance No. 1120 of 1987, and subsequently were removed to this Court pursuant to 28 U.S.C. § 1442. By order of February 23, 1993, these actions have been consolidated.

The parties agree that the relevant, material facts in this case are relatively simple and undisputed and that



the issues presented involve questions of law only.[1] The material undisputed facts are set out in Attachment A to this Order.

The questions of law presented by the cross-motions for summary judgment are:

> (1) Does Jefferson County Ordinance 1120 discriminate against defendants by reason of the federal source of their pay or compensation contrary to 4 U.S.C. §§ 105-111?
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> (2) If not, does Jefferson County Ordinance 1120 contravene the Constitution of the United States as applied to the defendant Article III judges?

## I. MOTIONS FOR SUMMARY JUDGMENT

### A. Statutory Construction

Plaintiff, Jefferson County, claims the right to impose "a privilege, license or occupational tax" upon defendants pursuant to: (1) Jefferson County Ordinance 1120 which imposes a tax of ½ of 1% on the gross income from the "vocation, occupation, calling or profession" subject to the tax: (2) Alabama Act 406 of 1967, (3) 4 U.S.C. § 111 (the Public Salary Act), and (4) 4 U.S.C. §§ 105-110 (the Buck Act). Defendants, United States District Judges, claim that the imposition of such "a license or privilege tax" would be unconstitutional as applied to them, or, if

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[1] Defendant Acker points out, however, that at most, plaintiff would be entitled to partial summary judgment on the issue of liability only because the amounts which defendants would owe in the event of liability are contested.

constitutional, discriminatory as so applied by reason of the source of their pay or compensation contrary to 4 U.S.C. § 111. The issues, therefore, initially require statutory construction, for generally a court must first determine whether the applicable statutes can be construed to avoid a constitutional determination.

Alabama Act 406, approved September 7, 1967, the enabling act,[2] authorizes Jefferson County to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay such a tax to the State of Alabama. The ordinance itself, enacted pursuant thereto, imposes a privilege, license or occupation tax upon all persons engaged in any "vocation, occupation, calling or profession . . . within the county" not subjected by state law to a privilege, license or occupational tax. The Court regards this as an exercise of the County's taxing, not its police, power.

A federal judge, in performing his or her official duties clearly is engaged in a "vocation," "occupation," "calling" or "profession." A federal judge is not required by state law to pay a privilege, license or occupational tax to the State of Alabama. The language of Act 406 and of

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[2] Plaintiff, a creature of the State, can impose no tax without authority from the State to do so. *See* Plaintiff's brief filed May 13, 1993, page 16, and cases cited. Plaintiff has no such authority to impose an "income" tax. *See Estes v. City of Gadsden*, 94 So. 2d 744 (Ala. 1957) and cases cited; *McPheeter v. City of Auburn*, 259 So. 2d 833 (Ala. 1972); *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988).



Ordinance 1120 therefore clearly embraces defendant judges.

In 1939, the United States Congress expressly consented to taxation of federal officers' "pay or compensation" by a state or local government.

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. § 111. Further, the Buck Act of 1947 provided:

> [n]o person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

4 U.S.C. § 106(a).

Both 4 U.S.C. § 111 and the Buck Act, 4 U.S.C. §§ 105-110, are facially applicable to the factual situation in this case since a defendant judge's salary undoubtedly

constitutes "pay or compensation for personal service as an officer or employee of the United States" and "income from . . . services performed in such [federal] area." The term "income tax" as used in the Buck Act, 4 U.S.C. §§ 105-109, is defined in 4 U.S.C. § 110(c) as *"any tax* levied on, with respect to, *or measured by*, net income, gross income or gross receipts," *id.* (emphasis added), and the tax here involved is clearly "measured by" gross income.

In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), the Alabama Supreme Court upheld Ordinance No. 1120 against the claim that it violates the Alabama Constitution. Although in its opinion the Alabama Supreme Court did not specifically address the issue of whether Ordinance No. 1120 imposes an unauthorized "income tax,"[3] by affirming the trial court (which apparently did consider that issue) it necessarily ruled, at least implicitly, that the tax involved is a valid license tax and is not an income tax.

In fact, the Alabama Supreme Court had previously ruled that another city's virtually identical tax is a "license" tax permitted by the Alabama Constitution, and not an "income" tax. *Estes v. City of Gadsden*, 94 So. 2d 744 (Ala. 1957). The *Estes* Court reasoned: "[i]t will be observed that the amount of the instant tax is measured entirely by gross receipts and, therefore, it is argued that this shows that this is an income tax. But this provision is

[3] Since Alabama itself levies an income tax upon all its citizens (Amendment 25 to Alabama Constitution of 1901) such a tax by a county would appear to be prohibited by Article IV, Section 105 of that Constitution.



merely a manner of measuring the tax." *Id.* at 750. In arriving at that result, the *Estes* court quoted from *Nachman v. State Tax Comm'n*, 173 So. 25 (Ala. 1937):

> [t]his court more than seventy years ago committed itself to the proposition that a tax upon "the gross amount of sales of merchandise" was not . . . a *property* or *income tax*, but an occupation or privilege tax, the amount being regulated by the extent to which the privilege has been enjoyed.

*Id.* at 31 (citation omitted) (emphasis in original).

Nevertheless, the determination by the Alabama courts that such a County Occupational Tax is a privilege-license tax, and not an "income" tax, is not determinative in this proceeding. The determination of what is an "income tax" under the Buck Act is a question of federal law. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624 (1953). Under federal law, in a case subject to the Buck Act, the method of measurement alone may determine whether a tax is an "income tax." In *Howard*, a Buck Act case, the Supreme Court held that an occupational tax or license fee imposed by the City of Louisville for the privilege of working within the city, albeit in a federal enclave, measured by one percent of income earned within the city, was an "income tax" within the meaning of the Buck Act. "Since the area is within the boundaries of the City of Louisville, and this tax is an income tax within the meaning of the Buck Act, the tax is valid." *Id.* at 629. But Justice Douglas, joined by Justice Black, dissented. "The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. . . . The Congress has not yet granted local authorities the

right to tax the privilege of working for or doing business with the United States." *Id. See also United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301, 301-11 (3d Cir. 1976) (applying the Buck Act definition to a school district occupational tax, following *Howard*).[4]

Similarly, the question of the applicability of 4 U.S.C. § 111, the Public Salary Act, is to be decided under federal law. In *United States v. City of Pittsburgh*, 757 F.2d 43 (3d Cir. 1985), decided under the Public Salary Act, the court held that a federal court reporter's fees for the sale of transcripts were "compensation" within the meaning of 4 U.S.C. § 111 which could be taxed under Pittsburgh's business privilege tax. The court noted that "Congress was aware that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Id.* at 47 (citation omitted). The court held that 4 U.S.C. § 111 constitutes consent to the state or local taxation of pay or compensation received by a federal officer or employee, and "waived the United States' right to constitutional sovereign immunity from state taxation of federal employees' income." *City of Pittsburgh*, 757 F.2d at 46. *Accord: Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 812 (1988).

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[4] The *Lewisburg* Court apparently had no trouble with an "assessment" based on the "average income of the profession," a method of assessment virtually indistinguishable from a flat license fee for each "profession." 539 F.2d at 310. Yet nominal, per-capita taxes remain prohibited, *Id.* at 311; *United States v. City and County of Denver*, 573 F. Supp. 686 (1983). It is the principle which is important, not the practical impact upon the federal taxpayer.



Since it is undisputed that the Jefferson County Occupational Tax is measured by gross receipts, this Court must conclude that the tax is an "income tax" for purposes of the Buck Act. Although the court in *Pittsburgh* referred to the "taxation of . . . income" (which normally indicates receipt of income as the taxable event) the tax involved was denominated a "business privilege tax" which, again, would normally indicate a franchise or privilege tax.

Defendants suggest that Ordinance 1120 violates the anti-discrimination provision of 4 U.S.C. § 111 in that a great number of potential taxpayers are exempted, or able to pay much less in taxes, because persons required to pay a license tax to the state itself are exempted from taxation under the ordinance. The record so shows. It is clear that factual discrimination is present, but not necessarily that it rises to the level of legal discrimination. Classification for the purpose of municipal licensing[5] does not require any rigid rule of equality of taxation. It must be substantially fair, but need not be precisely or mathematically equal in operation and effect. However, it may not be arbitrary, capricious or unreasonable. *See* Eugene McQuillin, *Municipal Corporations*, § 26.60, at 165-66 (3d ed. 1986); *McPheeter*, 259 So. 2d at 833 (1972); *Estes*, 94 So. 2d at 751. The record now before this Court does not demonstrate as a matter of law that any inequality here rises to such a level. Thus, the Court finds the evidence brought to its attention by defendants will not,

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[5] The federal consent ascribed to the Public Salary Act and the Buck Act would not alter the actual nature, characteristics and legal requirements of the tax as imposed by Alabama law.

at this juncture, support defendants' motion for summary judgment on the issue of discrimination.

Therefore, at this point the Court concludes:

1. Jefferson County Ordinance 1120 imposes a "license or privilege tax" upon the performance of defendants' duties as United States District Judges measured by that portion of their incomes earned while physically sitting in the United States Courthouse located in Jefferson County, Alabama.

2. Since the area (the United States District Courthouse in Birmingham, Alabama) is within the boundaries of (Jefferson County), and this (license or privilege) tax is an "income tax" within the meaning of the Buck Act, and purports to be levied "upon" the pay or compensation of defendants, the tax is valid facially. *Howard*, 344 U.S. at 624; *Pittsburgh*, 757 F.2d at 46-48.

In *Howard*, however, the Court recognized that interference with the jurisdiction of the United States might constitute an exception to its brief holding:

> [t]he fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.



*Howard*, 344 U.S. at 627. *See also* 4 U.S.C. § 107[6]; *United States v. State Tax Comm'n of Mississippi*, 412 U.S. 363, 379 (1973). Consideration of whether the ordinance at issue constitutes an "inteference with the jurisdiction asserted by the Federal Government" so as to involve antagonistic "sovereign rights" involves a constitutional inquiry since the boundary between sovereign federal rights and sovereign state rights is to be found in Article VI, Clause 2 of the United States Constitution. Other constitutional questions arise under Articles II (as it relates to appointment of federal judges) and III of the Constitution of the United States.

**B. Constitutional Construction**

1. *Is the tax unconstitutional as a direct tax on the United States?*

Defendants contend that Jefferson County Ordinance No. 1120 contravenes the Supremacy Clause, Article VI, Clause 2, of the United States Constitution insofar as it purports to make it unlawful for defendants to *hold the office* of United States District Judge (Ordinance 1120, § 1(c)) *or perform their duties* as federal judges in Jefferson County without paying the license or privilege tax imposed by the ordinance. Ordinance 1120, § 2. It is therefore necessary to determine: (1) the present scope of

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[6] "The provisions of . . . [4 U.S.C. § 106(a)] shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof. . . . " 4 U.S.C. § 107.

constitutional intergovernmental tax immunity, and (2) to what extent that immunity is subject to statutory waiver.

To begin, it is basic that the necessary independence of both the federal and state governments forbids that either should tax the courts or the judicial process of the other. *Smith v. Short*, 40 Ala. 385 (1867). *See McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 429-33 (1819); 84 C.J.S. § 125 (1954 & Supp. 1993). In *Smith v. Short*, the majority, proceeding directly to the issue of the constitutional limitations on taxation of judicial process[7], reasoned:

> [t]he power of taxation remains in the States, concurrent, and co-extensive with that of congress; with the sole exception of duties on imports and exports, which the States can not impose except by the consent of congress. – 2 Story on Con. § 937. Therefore congress has no more the power to tax judicial process of the State courts, than have the States to tax judicial process of the national courts.

*Smith v. Short*, 40 Ala. at 389.

Chief Justice Marshall had articulated much the same principle in *McCulloch v. Maryland*. This is an aspect of what has become known as the doctrine of intergovernmental tax immunity. In *McCulloch*, the doctrine found its most ample expression in the famous words of Chief Justice Marshall:

> [t]hat the power to tax involves the power to destroy; that the power to destroy may defeat

[7] Although *Smith v. Short* involved a federal stamp tax on writs issued by Alabama courts, the principle enunciated by the Alabama Supreme Court would seem to be broader.



> and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.[8]

*McCulloch*, 17 U.S. at 431.

The historical basis, and current status, of the constitutional doctrine of intergovernmental tax immunity are set forth in the majority opinion in *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 803. The Court stated:

> [a]fter *Graves [Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), frequently referred to as the *O'Keefe* case], therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.[9]

[8] Although this well-known statement has been depreciated (by Justices Holmes, Frankfurter and the second Marshall among others – *see Agricultural Bank v. Tax Comm'n*, 392 U.S. 339, 350-51 (1968), dissent of Marshall, J.), *McCulloch v. Maryland* continues to be relied upon. *See e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989); *North Dakota v. United States*, 495 U.S. 423, 434 (1990).

[9] *See also McPheeter v. Auburn*, 259 So. 2d at 836, where the Alabama Supreme Court, in assessing the effect of *Graves*, quoted from *McConnell v. City of Columbus*, 173 N.E.2d 760 (Ohio 1961): "[h]owever, since the decision in *Graves v. State of New York*, . . . it no longer can be seriously argued that a nondiscriminatory tax on income earned for services rendered to or work done for a government represents a legally recognizable interference with the activities of that government

*Id.* at 811. Thus, a fundamental issue before this Court is whether the Jefferson County Tax is "imposed directly on" the federal government.

*Graves* involved the constitutionality of a state *income* tax upon the salary received by an employee of the Home Owner's Loan Corporation (HOLC). *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). The income of the Corporation itself had been Congressionally exempted from state taxation. The Court stated that

> the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.

*Id.* at 481. Concluding that the state income tax was not a constitutionally impermissible burden, the *Graves* Court pointed out:

> 1. the tax was non-discriminatory;
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> 2. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the corporation or the government from their fund;

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so as to constitute a tax upon that government." 173 N.E.2d at 762 (citation omitted).

The state of the law in this area was similarly canvassed in *Western Ry. of Alabama v. State*, 3 So. 2d 9 (Ala. 1941), to much the same conclusion. *See also* Paul J. Hartman, *Federal Limitations on State and Local Taxation* chapter 6 (1981).



> 3. It is measured by income which becomes the property of the taxpayer when received as compensation for his services;
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> 4. And the tax is laid upon the privilege of receiving income, is paid from the taxpayer's private funds, and not from the funds of the government, either directly or indirectly.

*Graves*, 306 U.S. at 480.

The Court then held that:

> [t]he theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable, *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313, 314; *Hale v. State Board*, 302 U.S. 95, 108; *Helvering v. Gerhardt, supra;* cf. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514 [*see* particularly pp. 522-26]; *Fox Film Corp. v. Doyal*, 286 U.S. 123 [,128]; *James v. Dravo Contracting Co., supra*, 149; *Helvering v. Mountain Producers Corp.*, 303 U.S. 376. . . .

*Id.*, at 480-81.

For purposes of this litigation, the Court believes that there are significant differences between the two cases. The respondent in *Graves* was an employee of an agency created by Congress pursuant to the Commerce power. The Court pointed out that Congress had the power to grant immunity from state taxation with respect to the agencies which it can constitutionally create. *Id.* at 478. The federal judiciary, however, was not created by the Congress, but is co-equal with the Congress itself, and the Executive, by virtue of Articles I, II and III of the Constitution.

The *Graves* Court pointed out that "when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments." *Id.* at 477. The nature of the activities conducted determines whether the tax involved is upon the government itself. Here, the tax is on the privilege of performing the federal judicial function itself – one of the three grand (Legislative; Executive; Judicial) federal functions. Although measured by income, the tax here, nevertheless, is imposed upon the function itself, performed by officers of the government. It is not imposed upon the receipt by defendants, as citizens of Alabama, of income indistinguishable from their income received from other sources, as in the case of the employee of the HOLC.

Thus, in *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) (*Ex rel. Cohn*), one of the cases relied upon in *Graves*, 306 U.S. at 466, the Court had upheld as constitutional a tax by a state upon income received by its resident from rents on land located without the state and interest on bonds, also physically located without the state and secured by mortgages similarly situated. The Court held such a tax:

> apportioned to the ability of the taxpayer to pay it, is founded upon the protection by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by



> the receipt of income and represented by the power to control it, bears a direct relationship.

*Ex rel. Cohn*, 300 U.S. at 313.

*Graves*, a case involving the income of an employee of a government instrumentality, had been preceded closely in time and in principle by *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). *Dravo*, which had upheld a tax on a government contractor, is regarded as a seminal case in the field of intergovernmental tax immunity. *See* Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 6.15 at 289-90 (1981). There the Court pointed out:

> [t]he tax is not laid upon the Government, its property or officers.
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> . . . .
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> The tax is not laid upon an instrumentality of the Government.
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> . . . . Respondent is an independent contractor. The tax is non-discriminatory.
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> The tax is not laid upon the contract of the Government.

*James v. Dravo Contracting Co.*, 302 U.S. at 149 (citations omitted).

The tax in the instant case, by contrast, is laid upon officers of the Government in the very performance of their governmental functions. The *Dravo* Court noted that a "tax upon their [federal instrumentalities'] operations is a direct obstruction to the exercise of Federal powers." *Dravo*, 302 U.S. at 155 (quoting *Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 37 (1873)).

The *Cohn* Court had made it plain that it was holding constitutional a state *income* tax based upon "the receipt and command of income." *Ex rel. Cohn*, 300 U.S. at 314. That rationale subsequently became settled law in *O'Malley v. Woodrough*, 307 U.S. 277 (1939), but is not applicable to the privilege or occupation tax here at issue.

As the *Davis* Court pointed out, 4 U.S.C. § 111 (the Public Salary Act) merely modified the result in *Graves*, observing: "[w]hen Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretations placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. at 813. Congress did the same with respect to the *Buck* Act by disclaiming any intent to consent to imposition of a state tax directly upon the U.S. "or any instrumentality thereof." 4 U.S.C. § 107.

The *Davis* Court further stated:

> [i]t is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue influence by the others. *Graves*, 306 U.S. at 481; *McCulloch v. Maryland*, 4 Wheat. at 435-436. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary.[10]

*Davis*, 489 U.S. at 814.

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[10] If an individual has standing to raise the issue of unconstitutional discrimination, as in *Davis*, such individual has standing to raise any constitutional question with respect to the tax involved as it affects him.



In the case *sub judice*, the Jefferson County occupational tax is imposed directly upon a governmental function – the performance in the federal courthouse in Birmingham, Alabama of federal judicial functions. Those functions are the actual event taxed (the legal incidence of the tax). Thus, in *McPheeter*, the Alabama Supreme Court stated:

> [t]he ordinance imposes the tax or license fee in return for the privilege of engaging in a trade, occupation or profession in the City of Auburn and for being afforded the benefit of the facilities of the city while in the pursuit of that business.[11]
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> * * *
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> Imposing payment of the tax or license fee on the individual so engaged and employed places no tax burden on Auburn University, the State or the federal government as such. *The tax is* not *levied* on the employer-employee relationship, but *on the taxable event of rendering services or following a trade, business of profession.* The ordinance places the tax on an employee's privilege of working in the city limits of Auburn regardless of the person's employer or the place of residence of the employee.

*McPheeter*, 259 So. 2d at 835-36 (emphasis added) (citation omitted).

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[11] It is the government of the United States which receives benefit from the facilities of Jefferson County while its judicial business is being pursued, not the federal judges sitting in the courthouse located in Jefferson County.

The Jefferson County tax, of course, would be paid by individual federal judges, the defendants, out of their own pockets without imposing any monetary (economic) burden upon the Federal Government itself. The economic burden on defendants would be no less if the tax truly were an income tax. But the tax does not purport to, and legally cannot, be based upon the *receipt* by defendants *of income* from the performance of the functions (which would violate Alabama's constitution), but instead is based squarely upon their performance, as federal judges, of the judicial function (a federal operation) itself. *See McPheeter,* 259 So. 2d at 833.

Neither the Public Salary Act nor the Buck Act could, nor do they purport to, change the actual legal nature, incidence, or the effect, of the tax here involved as established by Alabama's highest court. *McPheeter,* and other Alabama cases on the actual nature and effect of the tax here, are important, and decisive, to the decision of the issues herein. The decisions of the United States Supreme Court on the constitutional issues here involved concern the actual characteristics and effects of the taxes considered, not the labels affixed thereto. If the true, actual incidence of the tax is the *receipt* of income, that is a taxable event within the jurisdiction of the State over its own citizens who receive the income; if, however, the true actual incidence of the tax is the performance of a federal judicial function, that is a taxable event without the jurisdiction of the state. The Alabama decisions establish the latter proposition.

Following the adoption of the XVI Amendment of the United States Constitution, the Government of the United States has jurisdiction over its citizens to tax their receipt



of income; the states probably have always had jurisdiction over their citizens to tax their receipt of income, certainly after *Graves,* 306 U.S. at 466. The proposition that the *receipt* of income *by the citizen of a state* is a taxable event within the taxing powers of the state found early expression in the dissent of Justice Johnson in *Weston v. Charleston,* 27 U.S. (2 Pet.) 449, 470-72 (1829). In that dissent he interpreted *McCulloch v. Maryland* as banning state and local taxes only when laid directly on the means used by the government in the exercise of its powers; but being of the opinion that the *Weston* tax was imposed on the *receipt of income* from federal securities (and thus, within his understanding of state taxing jurisdiction), he found no constitutional infirmity in the tax. In *McCulloch v. Maryland,* Chief Justice Marshall had declared:

> [i]f we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and the property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union. . . .

17 U.S. at 429-30. *See* Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 6:3 at 243. One hundred and seventy-five years later, after many intervening decisions, and the enactment of various statutes, the view that *receipt* of income, by the individual as citizen of the state,

is a taxable event separate and apart from his activities in earning income in his capacity as officer or employee of the Federal Government, appears to be good law today, as construed by the United States Supreme Court. *See O'Malley v. Woodrough*, 307 U.S. at 277.[12]

Article III, Section 1 of the United States Constitution provides (in part):

> [t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . .

In the United States's unique federal system, neither a state nor any of its subdivisions can diminish the power or authority of a judge appointed and serving under Article III. In *Harrison v. St. Louis & San Francisco R.R. Co.*, 232 U.S. 318 (1914), the Supreme Court reasserted:

> [i]t may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several States may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious.

*Id.* at 328.

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[12] Receipt of income may be protected by the anti-diminution clause of Article III, section 1 of the United States Constitution.



The adjudication of litigation in the federal courts is an exertion of the judicial power of the United States, and is an integral function, and an important operation, of the federal government. The federal judiciary is, without question, a "constituent part" of the federal government. *Cf. United States v. Township of Muskegon*, 355 U.S. 484, 486 (1958); *United States v. Boyd*, 378 U.S. 39, 47 (1964). It is an "arm[ ] of the government deemed by it essential for the performance of governmental functions." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942). *See Department of Employment v. United States*, 385 U.S. 355, 358-60 (1966) (holding Red Cross to be an instrumentality of the U.S. Government). This tax is, and legally must by Alabama law be, laid *directly* on the *performance of that function or operation*. *McPheeter*, 259 So. 2d at 835-37. The tax, therefore, is unconstitutional under the contemporary doctrine of intergovernmental tax immunity as set forth in the *Davis* case unless saved by the consent contained in the Public Salary Act and the Buck Act.

The Public Salary Act and the Buck Act are, of course, statutes which have been held to be valid exercises of Congressional power with respect to their subject matter. Their purpose, as expressed in the *Pittsburgh* case, was to waive the "United States' right to constitutional sovereign immunity from state taxation of federal employees' income." *Pittsburgh*, 757 F.2d at 46; *Davis*, 489 U.S. at 812. They were part of the resolution of a dispute, pending for well over a century, whether a tax on the *receipt* of *income* or other payment was an indirect tax on the government payor itself and, for that reason protected by intergovernmental tax immunity. *Davis*, 489 U.S. at 812. *See generally* Paul J. Hartman, *Federal Limitations on*

*State and Local Taxation*, chapter 6 and Supp. 1992. There has never been any substantial question since the decision in *McCulloch v. Maryland* that a state franchise tax upon a federal instrumentality is prohibited by the Constitution. The prohibition of such a tax is the very essence of the enduring concept of intergovernmental tax immunity. On that point, *McCulloch v. Maryland* is as good law today as it was in 1819. *See supra* note 4 at 7.

Thus, with respect to everything within the reach of Congressional powers, express or implied, the Court must conform to the decisions in *Pittsburgh*, and *Davis*, and hold that, to the extent of its power, Congress has waived the government's immunity from state taxation of the income of its employees. But, just as its is beyond the power of Congress to avoid the anti-diminution provisions of Article III, Sec. 1 of the United States Constitution, *United States v. Will*, 449 U.S. 200 (1980), so too, Congress cannot alter or impair the first class of Article III. Nor can it constitutionally give effective consent to such alteration or impairment by a state. Accordingly, the Court concludes that the tax imposed by Ordinance 1120, by express intention and in real effect, is a franchise tax imposed upon the federal judicial operations and is unconstitutional as a direct tax upon an officer and



instrumentality[13] of the United States, that is, upon the sovereign itself.

2. Does the tax violate Anti-Diminution Clause of Article III, Section 1 of the United States Constitution?

Article III, Section 1 of the Constitution of the United States provides, in part, that:

> [t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Ordinance 1120 of 1987, as applied to defendants, would diminish the compensation of Article III judges, at the very least that of those who had entered office prior to the enactment of that ordinance as had defendants. Defendant Clemon was appointed June 30, 1980; Defendant Acker was appointed August 18, 1982.

Prior to *O'Malley v. Woodrough*, 307 U.S. at 277, the Supreme Court had consistently held that even a federal net income tax could not, constitutionally, be imposed upon the salaries of federal judges. *Evans v. Gore*, 253 U.S.

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[13] Surely a federal judge is as integral a part of the United States as an officers club, *United States v. Tax Comm'n of Mississippi*, 412 U.S. at 363; *United States v. Tax Comm'n of Mississippi*, 421 U.S. at 599; a post exchange, *Standard Oil Co. v. Johnson*, 316 U.S. at 485; or the Red Cross, *Department of Employment v. United States*, 385 U.S. at 355. "Officers" are the flesh and blood equivalents of "instrumentalities."

245, 257 (1920) (even the XVI Amendment did not so authorize. *See Evans v. Gore*, (*cf.* Holmes J., and Brandeis J., dissenting)). And in *O'Malley v. Woodrough*, adopting substantially the reasoning of the Holmes-Brandeis dissent in *Evans v. Gore*, 253 U.S. at 264-66,[14] the Court, overruling *Evans v. Gore*, upheld the federal income tax as constitutional only as to judges of courts of the United States taking office after June 6, 1932. "For it was the Act of June 6, 1932 that gave notice to all judges thereafter to be appointed, of the new congressional policy to include the judicial salaries of such judges in the assessment of [federal] income taxes." *O'Malley v. Woodrough*, 307 U.S. at 279. Justice Frankfurter, in the majority opinion in *O'Malley*, stated:

> Congress [by the Revenue Act of 1932] has committed itself to the position that *a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III, § 1 of the Constitution.* To suggest that it makes inroads upon the independence of judges who took office after Congress had thus charged them with the common duties of citizenship, by making them bear their aliquot share of the cost of maintaining the Government, is to trivialize the great historic experience on which the

[14] "I think that the moment the salary is received, whether kept distinct or not, it becomes a part of the general income of the owner. . . . I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond." *Evans v. Gore*, 253 U.S. at 266 (Holmes, J., dissenting). The tax here becomes effective even before the income is earned, and before it is paid, and before it is received.



> framers based the safeguards of Article III, § 1. To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.[15]

307 U.S. at 282 (emphasis added). The Court went on to note:

> [a]fter this case came here, Congress, by § 3 of the Public Salary Tax Act of 1939, amended § 22(a) [of the Revenue Act of 1932] so as to make it applicable to "judges of courts of the United States who took office on or before June 6, 1932." That section, however, is not now before us. But to the extent that what the Court now says is inconsistent with what was said in *Miles v. Graham*, 268 U.S. 501, latter cannot survive.

*Id.* at 282-83. Before the amendment effectuated by § 3 of the Public Salary Tax Act, the Revenue Act of 1932 had provided, in § 209:

> "[i]n the case of the judges of the Supreme Court, and of the inferior courts of the United

[15] Justice Frankfurter's analysis, with its emphasis on citizenship, echoes that of Chief Justice Marshall. As applied to this case, Alabama (Jefferson County) has full authority to tax, without discrimination, those taxable events which are aspects of defendants' Alabama citizenship and over which it has authority, but not those "conferred by the people of the United States on the government of the Union," the exercise of Article III judicial power.

> States created under Article III of the Constitution, who took office on or before June 6, 1932, the compensation received as such shall not be subject to income tax under the Revenue Act of 1938 or any prior revenue Act."

*Id.* at 282, n.10.

The explicit holding of the *O'Malley* Court, therefore, was that only judges appointed *after* the Revenue Act of 1932 did not enjoy Article III anti-diminution immunity with respect to the levying of the net income tax imposed thereby. But *O'Malley* approved, and set into the constitutional framework, the proposition "that a non-discriminatory tax laid generally on net income[16] is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition of Article III § 1, of the Constitution." *O'Malley*, 307 U.S. at 282. To this extent

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[16] *Cf.* dissent of Justices Douglas and Black (both voting with the majority in *O'Malley*) in *Howard*:

> "I have not been able to follow the argument that this tax is an 'income tax' within the meaning of the Buck Act. It is by its terms a 'license fee' levied on the privilege 'of engaging in certain activities.'. . . . The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of tax the Kentucky Court of appeals held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States."

*Howard*, 344 U.S. at 629 (citation omitted). *See also Murdock v. Pennsylvania*, 319 U.S. 105 (1943), where Justice Douglas, writing for the majority, expressed the same idea in a First Amendment context. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon." *Id.* at 112.



only, as indicated by Justice Frankfurter, the holding in *Miles v. Graham*, 268 U.S. at 509, that "there is no power to tax a judge of the United States on account of the salary prescribed for him by law," was rejected.[17]

The legislative definition of "income tax" in 4 U.S.C. § 110(a) is inapposite to the constitutional question before this Court, the answer to which depends upon determining what is the actual legal effect and incidence of the tax. The tax imposed by Ordinance 1120 is *not* an income tax as such is generally understood, nor is it an income tax under Alabama law. *McPheeter*, 259 So. 2d at 834-37; *Estes*, 94 So. 2d at 746-52. That is so because it is not, in fact, a tax upon the *receipt* of income, pay, or compensation, (the taxable event held in *O'Malley* to be constitutionally permissible), but rather, is a license or privilege tax which finds its taxable event, or incidence, in the *performance* of a federal judicial function. Its incidence, thus, is upon the performance of judicial functions by a judicial officer,

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[17] *See generally* Justice Frankfurter's later views as expressed in his dissenting opinion in *City of Detroit v. Murray Corp.*, 355 U.S. 489, 495-505 (1958), where he refers to the "residuum" of continuity in the intergovernmental tax immunity cases, crediting Chief Justice Marshall with establishing the governing principles, including,

> " '[t]hat the *attempt* to use the power of taxation on the means employed by the government of the Union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. . . . *Weston v. City Council of Charleston*, 2 Pet. 449, 467 as quoted by Mr. Justice Bradley in *Railroad Co. v. Peniston*, 18 Wall. 5, 38-39 dissenting opinion).' "

*City of Detroit*, 355 U.S. at 497 (emphasis added.)

antecedent to the point that the salary therefor having been paid by the government becomes the property of the individual citizen of Alabama, mixed with all his other goods and subject to the protection and benefits he receives as a citizen of Alabama.

Although Congress certainly has full power to grant or waive immunity as to officers or instrumentalities created by it, and perhaps even as to itself, and perhaps even beyond the boundaries which the Supreme Court would set were Congress silent, *North Dakota v. United States*, 495 U.S. 423, 439 (1990), it has no power to impair or to waive the anti-diminution clause of Article III, Section 1, as to United States judges appointed and serving thereunder. In *United States v. Will*, 449 U.S. at 228-29, the Supreme Court held that Congress had no power to withdraw a judicial salary increase that had already vested. The *Will* Court stated that: "[a] paramount-indeed, an indispensable-ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches." 49 U.S. at 228.

The tax here in issue constitutes an unconstitutional diminution of defendants' compensation and is invalid as to them. Both defendants were appointed prior to the enactment of Ordinance No. 1120. The enactment of that ordinance constituted no notice to them that their salaries as federal judges would be diminished by the amount of the tax. Their entitlement to the salary prescribed by Congress for federal district judges had vested prior to the enactment of Ordinance 1120. The Court therefore



finds that ordinance unconstitutional as applied to defendants as contrary to Article III, Section 1 of the Constitution of the United States.

The Court should note, however, that were it necessary it would hold that even if the ordinance had been enacted before the defendants' appointments, the tax imposed thereby would nevertheless constitute an unconstitutional diminution of defendants' salaries contrary to Article III, Section 1. It is not a true income tax, but is imposed directly upon an exclusively federal function; it effectively diminishes the compensation which the judge is entitled to receive, rather than taxing an incident of defendants' state citizenship.

Accordingly, the Court GRANTS defendants' motion for summary judgment on the ground that Ordinance 1120 as applied to the defendant judges contravenes Article III of the United States Constitution, as well as the Constitution's Supremacy Clause, Article VI, and DENIES plaintiff's motion for summary judgment. In view of the above ruling, and for the reasons set forth above, the Court does not reach the question whether ordinance 1120 is discriminatory with respect to the source of the pay or compensation taxed.

## II. ALL OTHER MOTIONS

In view of the above ruling, the Court **DENIES** all remaining motions as moot.

## CONCLUSION

In sum, the Court; 1) GRANTS defendants' motion for summary judgment; (2) DENIES plaintiff's motion for summary judgment; and 3) DENIES all other motions as MOOT.

The Clerk of Court is DIRECTED to enter final judgment in favor of defendants and against plaintiff and to assess costs against plaintiff.

SO ORDERED, this 31st day of March, 1994.

/s/ Charles A. Moye, Jr.
CHARLES A. MOYE, JR.
UNITED STATES
DISTRICT JUDGE

## ATTACHMENT A

## UNDISPUTED MATERIAL FACTS

1. Alabama Act 406 (1967) authorizes Jefferson County, Alabama, to impose a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession who are not required by state law to pay a privilege, license or occupational tax to the state of Alabama.

2. In 1987, the Jefferson County Commission, the governing body of the County, enacted Ordinance 1120, which imposes a privilege, license or occupational tax upon all persons engaged in any vocation, occupation, calling or profession within the County not required by state law to pay a privilege, license or occupational tax to the state.



Sections 2 of Jefferson County Ordinance No. 1120 provides:

> [i]t shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession . . . within the county . . . without paying license fees for the privilege of engaging in or following such vocation, occupation, calling or profession. . . .

Section 1, Definitions, subsection (C), provides:

> [t]he words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

3. The effective date of the ordinance was January 1, 1988. The County Occupational Tax is measured at the rate of one-half of one percent (.005) of the gross receipts earned within the geographic boundary of Jefferson County, Alabama.

4. At all times since January 1, 1988, defendants have been employed by the United States of America as District Judges for the Northern District of Alabama pursuant to Article III of the Constitution of the United States.

5. The Northern District of Alabama is composed of 31 counties, including Jefferson County.

6. Defendants maintain their principal offices at the Hugo Black Federal Courthouse in the City of Birmingham, Jefferson County, Alabama.

7. Defendants routinely perform some but not all of their duties outside of Jefferson County, Alabama.

8. Ordinance No. 1120, Section 3, provides:

> [i]n cases where compensation is earned as a result of work done or services performed both within and without the County, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Since the effective date, neither the Administrative Office of the United States Courts nor any Article III judge in the Northern District of Alabama, has ever made an oath certifying the alleged amounts of federal judge's salary earned within and without Jefferson County.

9. Defendants are not required by any state law to pay any privilege, license or occupational tax to the state of Alabama. Defendants, however, still pay their dues (one-half of the dues of a licensed practicing attorney) to the Alabama State Bar, which is an integrated bar, and, as such, is an arm or agency of the State of Alabama. Although defendants are not and cannot be licensed to practice law, they remain sustaining or auxiliary members of the bar as they still pay their dues.

10. The Administrative Office of the United States Courts has never withheld County Occupational Tax from any federal judge or court employee pursuant to the provisions of Ordinance No. 1120.



11. All active judges of the Northern District of Alabama except defendants have paid the County Occupational Tax on differing percentages of their judicial salaries to Jefferson County without supporting those percentages by an oath or by any formal accounting procedure. At least one Article III judge (not a defendant) has paid "under protest."

12. All state District and Circuit Court Judges of the Tenth Judicial Circuit of Alabama have paid the County Occupational Tax. The three Alabama Supreme Court Justices with satellite offices in Jefferson County have paid the County Occupational Tax based on portions of their salaries.

13. The Honorable Robert S. Vance, United States Circuit Judge, who served on the Court of Appeals for the Eleventh Circuit, and who, from January 1, 1988 until his death, and his chambers in Jefferson County, Alabama, where he resided and spent most of his time, never paid the County Occupational Tax.

14. Since 1970, the City of Birmingham, Alabama, has imposed an occupational tax at the rate of one percent of gross receipts (twice the rate of the County Tax) on persons engaged in any vocation, occupation, calling or profession within the City.

15. All active judges of the Northern District of Alabama except defendant Acker have paid the City Occupational Tax.

16. Defendant Clemon has paid the City Occupational Tax on approximately 66 percent of his gross earnings during his entire tenure as a United States District Judge.

17. Since 1962, the City of Gadsden, Alabama, where defendant Acker has regularly held court for the last 11 years, has had an occupational tax ordinance similar to the County Occupational Tax, except that it contains no exemptions. The Gadsden ordinance provides in pertinent part:

> [i]t shall be unlawful for any person to engage in or follow any trade, occupation or profession, as defined in this article, within the city on and after the first day of February, 1962, without paying license fees for the privilege of engaging in or following such trade, occupation or profession, which license fees shall be measured by two (2) per cent of the gross receipts of each such person.

Gadsden, Alabama Code, Section 7-51.

18. The City of Gadsden has made no effort to exact or to collect a license fee from any of the several Article III judges who, regularly, have sat in the Middle Division of the Northern District of Alabama, which has its courthouse in the City of Gadsden.

19. Defendants have paid their Alabama state income taxes throughout their tenures as federal judges.

20. A final decree entered by defendant Acker as an Article III judge after January 1, 1988, has been formally attacked under Rule 60(b), Fed.R.Civ.P., as having been "unlawfully" entered because said order was entered by defendant Acker when he had not paid his license fee to Jefferson County pursuant to Ordinance No. 1120.

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ARTICLE III.

Section 1.

*[Judicial Power, Tenure of Office]*

The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

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## ARTICLE VI.

*[Debts, Supremacy, Oath]*

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious tests shall ever be required as a qualification to any office or public trust under the United States.



**§ 106. Same; income tax**

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940.

* * *

**§ 110. Same; definitions**

As used in sections 105-109 of this title –

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State.

(July 30, 1947, c. 389, 61 Stat. 645.)

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### § 111. Same; taxation affecting Federal employees; income tax

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

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## § 5520. Withholding of city or county income or employment taxes

(a) When a city or county ordinance –

(1) provides for the collection of a tax by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to a designated city or county officer, department, or instrumentality; and

(2) imposes the duty to withhold generally on the payment of compensation earned within the jurisdiction of the city or county in the case of employees whose regular place of employment is within such jurisdiction;

the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the city or county within 120 days of a request for agreement by the proper city or county official. The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the city or county ordinance in the case of any employee of the agency who is subject to the tax and (i) whose regular place of Federal employment is within the jurisdiction of the city or county with which the agreement is made or (ii) is a resident of such city or county. The agreement may not apply to pay for service as a member of the Armed Forces (other than service described in section 5517(d) of this title). The agreement may not permit withholding of a city or county tax from the pay of an employee who is not a resident of, or whose regular place of Federal employment is not within, the State in



which that city or county is located unless the employee consents to the withholding.

(b) This section does not give the consent of the United States to the application of an ordinance which imposes more burdensome requirements on the United States than on other employers or which subjects the United States or its employees to a penalty or liability because of this section. An agency of the United States may not accept pay from a city or county for services performed in withholding city or county income or employment taxes from the pay of employees of the agency.

(c) For the purpose of this section –

(1) "city" means any unit of general local government which –

(A) is classified as a municipality by the Bureau of the Census, or

(B) is a town or township which, in the determination of the Secretary of the Treasury –

(i) possesses powers and performs functions comparable to those associated with municipalities,

(ii) is closely settled, and

(iii) contains within its boundaries no incorporated places, as defined by the Bureau of the Census,

within the political boundaries of which 500 or more persons are regularly employed by all agencies of the Federal Government;

(2) "county" means any unit of local general government which is classified as a county by the Bureau of the Census and within the political boundaries of which 500 or more persons are regularly employed by all agencies of the Federal Government;

(3) "ordinance" means an ordinance, order, resolution, or similar instrument which is duly adopted and approved by a city or county in accordance with the constitution and statutes of the State in which it is located and which has the force of law within such city or county; and

(4) "agency" means –

(A) an Executive agency;

(B) the judicial branch; and

(C) the United States Postal Service.

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31 CFR § 215.2

* * *

(a) "Agency" means each of the executive agencies and the military departments (as defined in 5 U.S.C. § 105 and 102 respectively) and the United States Postal Service and in addition for city or county withholding purposes only ***all elements of the judicial branch.***

* * *

(f) "County income or employment taxes" means *any form of tax* for which, under a county ordinance

(1) Collection is provided by imposing on employers generally the duty of withholding sums from the pay of employees and making return of the sums to a designated county officer, department or instrumentality, and;

(2) The duty to withhold generally is imposed on the payment of compensation earned within the jurisdiction of the County in the case of an employee whose regular place of employment is within such jurisdiction. ***Whether the tax is described as an income tax, wage, payroll, earnings, occupational license or otherwise is immaterial.***

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Act No. 406 H. 832 – House, Cherner, Waggoner, Holman, Crane, Yeilding, Ellis, Adwell, Gloor, Jackson (T), Money, Bowers

AN ACT

To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

*Be It Enacted by the Legislature of Alabama:*

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms shall have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.



Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business, for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest

municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

Approved September 7, 1967.

Time: 10:37 A.M.

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OCCUPATIONAL TAX

of

**JEFFERSON COUNTY**

**ALABAMA**

Adopted by Ordinance Number 1120

of Jefferson County Commission

September 29, 1987

DAVID ORANGE, President

Jefferson County Commission

Commissioner of Finance & General Services

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|---|---|
| REUBEN DAVIS | JIM GUNTER |
| Commissioner Health & Human Resources | Commissioner Community & Economic Development |
| CHRIS McNAIR | DR. JOHN KATOPODIS |
| Commissioner Environmental Services | Commissioner Roads & Transportation |

**ORDINANCE NO. 1120**

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

**Section 1. DEFINITIONS.** That the following words, when used in this Ordinance, shall have the meaning

ascribed to them, except where the context clearly indicates or requires a different meaning.

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§ 40-21-50, 40-21-52; 53, 54 and 55;



40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received;

but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by the employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

**Section 2. LICENSE FEES REQUIRED.** It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

**Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY.** In cases where compensation is earned as a result of work done or services performed both within



and without the county, the license fees required under this Ordinance shall be computed by determining upon the oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

**Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS.** Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the county for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at

the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

**Section 5. RETURNS TO BE FILED BY EMPLOYEES.** When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees



for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

**Section 6. DUTIES OF THE DIRECTOR OF REVENUE.** It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

**Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE.** The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any licensee or supposed licensee, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunity for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this and he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

**Section 8. REGULATIONS MAY BE PROMULGATED.** The Director of Revenue may prescribe, adopt, promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.



**Section 9. INFORMATION TO BE CONFIDENTIAL.** Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

**Section 10. INTEREST AND PENALTIES.**

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as provided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such

person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

**Section 11. EXTENSION OF TIME FOR MAKING RETURN.** The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due to be



made and shall not prevent penalty and interest from accruing during the period of such extension.

**Section 12. USE OF LICENSE FEES.** All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

**Section 13. SEVERABILITY.** The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

**Section 14. REPEAL OF RESOLUTION AND ORDINANCES.** All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

**Section 15. EFFECTIVE DATE.** This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

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REVENUE AND TAXATION

CHAPTER 12.

LICENSES.

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**Article 8.**

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### § 40-12-1. Change of place of business.

When a person has obtained a license to engage in or carry on any business, employment, or profession at any definite place in a county or city in Alabama and desires to remove to any other place within the same county or city where the license was granted and wishes his license altered accordingly, the probate judge who originally issued such license shall make such alteration, which alteration shall be shown on the license records of the probate judge's office; provided, that no license shall be altered to change a place of business to a location requiring a higher license than originally paid. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 830.)

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### § 40-12-2. Issuance; form of license; levy of county tax; actions for recovery of tax.

(a) Before any person, firm, or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they, or it, except as otherwise provided, shall pay to the judge of probate of the county in which it is proposed to engage in or carry on such business or do such act, or to the commissioner of licenses or the State Department of Revenue, as specified, the amount required for such license and shall comply with all the other requirements of this title.

(b) Upon the payment of the amount required for said license and a fee of $1 herein provided for the issuance of such license and all costs and fees and penalties which shall have accrued, or for which such person,

firm, or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, such probate judge, commissioner of licenses or Department of Revenue shall issue the license properly countersigned, in the form and on the blank to be furnished by the comptroller, which shall set forth and specify the name of the person, firm, or corporation applying therefor, whether the business, profession, or occupation for which the license is procured is owned by an individual, partnership, corporation, or other association, stating the name of the individual, the name of each of the partners if a partnership, the exact name of the corporation or association, if a corporation or association, and the name of each of the principal officer thereof, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same, if such location shall be in a city or town and have a street number and, if not, then the location and amount paid for such license, and the time for which it is issued; and if the license is for a peddler it shall state whether he proposes to travel on foot or on horseback or on wagon or motor vehicle; provided, that the governing body of any county may furnish application blanks in such form that the applicant for a license may supply the above information in writing; and such license shall not be transferable except as otherwise provided herein, nor shall it entitle the holder thereof to carry on any other business or do any other act than that named therein.

(c) Whenever a license is levied in this title, there shall be collected both a state and county license for each



place of business, except as specifically otherwise provided.

(d) In case it should become necessary to remove any business for which a license is required by this section from one location to another location in the same county, and such business is continued as the same kind and character and by the same person or firm as that carried on at the former location, another license shall not be required for such business for the same license year.

(e) There is hereby levied for the use and benefit of and to be paid to the county in which the license is issued, in addition to all license taxes levied under the provisions of Article 2 of this chapter, for state purposes and which are payable to the judge of probate or commissioner of licenses, a sum equal to 50 percent of the amount levied for state purposes, except as otherwise specifically provided.

(f) Any action to recover the amount due for any license, whether levied solely for state purposes or for state and county purposes, shall be instituted by the State of Alabama and may include all penalties and fees due by any person, in addition to the amount due for such license and interest thereon. The amount recovered in any such actions shall be paid to the State Department of Revenue, and if any portion of said license was levied for county purposes, such portion shall be remitted to the county in which such license was payable, and the department may from the amount of any penalties or fee thus recovered remit the amount, if any, due to the judge of probate, commissioner of licenses, or license inspector. (Acts 1935, No. 194, p. 256; Acts 1939, No. 18, p. 16; Code

1940, T. 51, § 831; Acts 1943, No. 546, p. 535; Acts 1951, No. 700, p. 1208; Acts 1984, No. 84-446, p. 1040, § 7.)

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**§ 40-12-9. Penalty for failure to take out license; selling throughout state under one license.**

(a) It shall be unlawful for any person, firm, or corporation to engage in or carry on any business, or do any act for which a license is required now or may hereafter be by law, without having first paid for and taken out a license therefor in the manner in this title provided. Any person who is convicted of failing to take out and pay for the license required shall be fined not less than the amounts of all licenses required of him and, if convicted for refusing to take out the license shall, on conviction, be fined not less than the amount of the state and county license due by him and not more than $100 in addition thereto, and may be sentenced to hard labor for the county for not more than six months, all fines to be paid in money; and, when collected, two thirds shall be paid to the state and one third to the county.

(b) No person shall be allowed the privilege of selling throughout the state under one license except by special provisions of law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 834.)

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**§ 40-12-11. Bonds of license inspectors.**

Before entering upon the duties of their office, all license inspectors shall execute to the State of Alabama a bond, to be approved by the Governor, in amounts to be fixed by the Department of Revenue, for the faithful performance of their duties. (Acts 1943, No. 122, p. 123; Acts 1961, Ex. Sess., No. 208, p. 2190.)

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**§ 40-12-12. License to designate place of business.**

Every license granting authority to engage in or exercise any business, employment, or profession, unless expressly authorized elsewhere or otherwise, shall designate the place of such business, employment, or profession at some specified house or other definite place within the county of the probate judge granting it. Engaging in or exercising any such license, business, employment, or profession elsewhere than at such house or definite place, unless expressly authorized elsewhere or otherwise by law, shall be held to be without license. A license which does not specify such house or definite place where business, employment, or profession is limited thereto by law shall be void. (Acts. 1935, No. 194, p. 256; Code 1940, T. 51, § 836.)

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**§ 40-12-13. Engaging in several businesses.**

Where any person, firm, or corporation is engaged in more than one business which is made by the provisions of law subject to taxation, such incorporated company or person shall pay the tax provided by law on each branch of the business. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 838.)

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**§ 40-12-14. Two or more licenses on same business.**

Wherever in this title two or more licenses on the same business or occupation are required, it is hereby declared to be the intention of the legislature that all such licenses as are herein levied shall be collected without credit or offset, except where specific provision is made therefor. (Acts. 1935, No. 194, p. 256; Code 1940, T. 51, § 839.)

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**§ 40-12-15. License deemed a personal privilege; transferability.**

(a) Every license shall be held to confer a personal privilege to transact the business, employment, or profession which may be the subject of the license and shall not be exercised except by the person, firm, or corporation licensed, unless specifically authorized by law to do so.



(b) When a business or privilege for which such license is issued is, under actual sale, transferred to a new ownership, a transfer of license may be effected by application to the probate judge originally issuing such license and the payment of a fee of $1. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 840; Acts 1984, No. 84-446, p. 1040, § 7.)

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**§ 40-12-40. Who must procure state and county licenses.**

Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling, or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 450.)

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**§ 40-12-43. Actuaries, auditors, and public accountants.**

Each professional actuary, auditor, or public accountant shall pay a license tax of $25 to the state, but no

license tax shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person above named is engaged, each person so engaged shall pay a license tax of $25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51 § 453.)

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**§ 40-12-44. Adding machines, calculating machines, comptometers, etc.**

Each person engaged in the business of selling adding machines, calculating machines, comptometers, billing machines, bookkeeping machines, cash registers, typewriters, or similar machines shall pay the following annual privilege tax: in counties of over 100,000 inhabitants, $100; in counties of over 60,000 inhabitants and not over 100,000 inhabitants, $60; in counties of over 40,000 inhabitants and not over 60,000 inhabitants, $40; in counties of 40,000 inhabitants or less, $25. (Acts 1935, No. 194, p. 256; Code 1940, T. 51 § 454.)

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**§ 40-12-45. Advertising**

All bill posting and advertising companies displaying advertisements in public places, including streetcars, and each person engaged in the business of advertising or bill posting shall pay the following license taxes: in counties having 200,000 inhabitants or over, $150; in



counties of less than 200,000 inhabitants and as many as 100,000 inhabitants, $125; in counties of less than 100,000 inhabitants and as many as 75,000 inhabitants, $100; in counties of less than 75,000 inhabitants and as many as 50,000 inhabitants, $50; in counties of less than 50,000 inhabitants and as many as 30,000 inhabitants, $25; in counties of less than 30,000 inhabitants, $15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 456.)

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**§ 40-12-48. Architects.**

Each architect practicing his profession for the public shall pay to the state a license tax of $25, but no license shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person above named is engaged, each person so engaged shall pay the amount provided above. (Acts 1935, No. 194, p. 256; Code 1940, T. 51 § 459.)

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**§ 40-12-49. Attorneys.**

(a) Each attorney engaged in the practice of law shall pay an annual license tax to the state, but none to the county. On October 1, 1992, the license tax shall be $200, and on October 1, 1993, and each year thereafter,

the annual license tax shall be $250. If business is conducted as a firm or as a corporation in which more than one lawyer is engaged, each lawyer shall pay such license tax, but no lawyer shall be required to pay a license tax until the first day of October following admission to the bar. The license tax shall be paid to the Secretary of the Board of Bar Commissioners of the Alabama State Bar. The funds collected for the issuance of the license tax levied shall constitute a separate fund to be disbursed on the order of the Board of Commissioners of the Alabama State Bar. As soon after the first day of each November as practicable, the Secretary of the Alabama State Bar shall certify to the presiding judge of the circuit court having jurisdiction in the county the names of attorneys who have paid the license fee.

(b) The license taxes shall be due and payable on October 1 of each year and shall be delinquent on the following November 1. If a license is delinquent, the Secretary of the Board of Bar Commissioners of the Alabama State bar shall assess and collect a penalty of 15 percent of the amount of the license. The penalty shall be paid when the license is issued.

(c) Section 40-12-10, relating to the collection and distribution of business license taxes shall not be applicable to license taxes provided in subsection (a). ((Acts 1935, No. 194, p. 256; Acts 1939, No. 551, p. 871; Code 1940, T. 51, § 460; Acts 1951, No. 186, p. 437; Acts 1959, No. 156, p. 682; Acts 1966, Ex. Sess., No. 287, p. 430; Acts 1971, No. 958, p. 1716; Acts 1979, Ex. Sess., No. 79k-27, p.



37; Acts 1985, 1st Ex. Sess., No. 85-119; Acts 1992, No. 92-600, p. 1246, § 1.)

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**§ 40-12-50. Auctioneers.**

Auctioneers and apprentice auctioneers shall pay annual license taxes in accordance with Chapter 4 of Title 34.

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**§ 40-12-70. Cereal beverages, carbonated or other soft drinks – Wholesalers.**

Each person engaged in the business of selling at wholesale nonalcoholic, carbonated, or other soft drinks shall pay an annual license tax of $50; provided, that bottlers who have taken out the bottle license for operating plants in this state shall not be liable under this section, nor shall such bottlers be liable for any county or state license under Section 40-12-174, nor as transient vendors or dealers or peddlers. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 483.)

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**§ 40-12-71. Certified public accountants.**

(a) In lieu of any other privilege license fees levied under the revenue laws of the State of Alabama, each person who holds a certificate as a certified public accountant and who is a resident of the State of Alabama and who is engaged in the practice of public accounting in the State of Alabama shall pay an annual license fee of $25, but no license fee shall be paid to the county. Such license shall be obtained from the probate judge or licensing agency in the county where the business of a certified public accountant is located and shall be due and delinquent as provided by Section 40-12-26. All money paid into the treasury for license under this section shall be deposited in the State Treasury to the credit of the Alabama State Board of Public Accountancy and shall constitute a separate fund to be disbursed as provided in subsection (b) of this section.

(b) The fund provided by subsection(a) of this section shall be used by the Alabama State Board of Public Accountancy to defray the expenses for administering and enforcing the laws of the State of Alabama pertaining to the practice of public accounting and the other necessary purposes and expenses of said board not otherwise available and provided pursuant to Section 34-1-3; and the said Alabama State Board of Public Accountancy shall have the power to direct the disbursement of said fund, which shall be paid on the warranty of the State Comptroller upon certificate or voucher of the secretary of said board, approved by the chairman or vice-chairman of said board. No funds shall be withdrawn or expended



except as budgeted and allotted according to the provisions of Article 4 of Chapter 4 of Title 41, and only in amounts as stipulated in the general appropriations bill.

(c) No license fee as herein provided shall be due or payable by any certified public accountant employed by any state or federal government agency, educational institution, or industry, who does not perform public accounting service for which he is paid. (Acts 1969, No. 269, p. 599, §§ 1-3.)

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**§ 40-12-72. Cigars, cigarettes, cheroots, etc. – Retailers.**

Each retail dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, or snuff, or any substitute therefor, either or all, shall pay to the state the following privilege license tax: in cities of 25,000 inhabitants and over, $15; in cities or towns of 10,000 inhabitants and less than 25,000 inhabitants, $10; in cities or towns of 5,000 inhabitants and less than 10,000 inhabitants, $5; in cities or towns of 2,000 inhabitants and less than 5,000 inhabitants, $3; in all other places, whether incorporated or not, $2. This privilege license tax is levied on each place of business owned or operated by retail dealers, whether under the same roof or not. The phrase "retail dealer" as used in this section shall include every person, firm, corporation, club, or association, other than a wholesale dealer as defined in Section 40-12-73, who shall sell or store or offer for sale any one or more of the articles enumerated herein, irrespective of quantity or

amount, or the number of sales. The privilege license tax herein defined shall be in addition to the sales tax as provided in Section 40-25-2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 484.)

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**§ 40-12-73. Cigars, cigarettes, cheroots, etc. – Wholesalers.**

Each wholesale dealer in cigars, cheroots, stogies, cigarettes, smoking tobacco, chewing tobacco, snuff, or any substitute therefor, either or all, shall pay one privilege license tax to the state of $100 and $5 to each county in which such wholesale dealer does business. The phrase "wholesale dealer" as used in this section shall include persons, firms, corporations, clubs, or associations who shall sell or store or offer to sell any one or more of the articles enumerated herein to retail dealers for the purpose of resale only. The privilege license tax herein levied shall be in addition to the sales tax as provided in Section 40-25-2. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 485.)

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**§ 40-12-95. Devices for testing skill and strength used for profit.**

For each device used by persons as a source of profit to themselves, such as throwing at wooden figures or any object of like character, striking at an object to test the strength, blowing to test the lungs, or other devices of like character, or for operating a cane rack, a knife rack, or similar rack or table, there shall be paid a license tax of $25, in each county in which it is operated, but this section shall not be construed to legalize the operation of any device which is now prohibited by law. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 507.)

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**§ 40-12-96. Directories.**

Each person compiling, selling, or offering for sale directories shall pay to the state license taxes as follows: for each city or town of 100,000 inhabitants or over, $150; in cities or towns of 50,000 and less than 100,000 inhabitants, $75; in cities or towns of 20,000 and less than 50,000 inhabitants, $50; in cities and towns of less than 20,000 inhabitants, $15; provided, that this section shall not apply to directories issued by any person in connection with or as a part of a business for which a general license tax is provided. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 509.)

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### § 40-12-97. Electric refrigerators, electric or gas heaters, etc.

For each dealer in electric, gas, or other mechanical refrigerators, electric or gas heaters, electric or gas water heaters, electric or gas stoves, or for each electrical or gas repair shop, or electrical or gas supply shop there shall be paid a license tax as follows: in cities of 100,000 inhabitants or over, $30; in cities of 50,000 and less than 100,000 inhabitants, $20; in cities of 10,000 and less than 50,000 inhabitants, $10; and in places of less than 10,000 inhabitants, whether incorporated or not, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 511.)

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### § 40-12-98. Embalmers.

Each embalmer shall pay an annual license tax of $10. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 512.)

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### § 40-12-99. Engineers.

Each person practicing for the public the profession of civil, electrical, mining, mechanical, or radio engineering shall pay an annual license tax of $20 to the state, but no license shall be paid to the county. If such business is conducted as a firm or corporation in which more than one engineer is engaged, each engineer so engaged shall



pay a license tax of $20. No such engineer shall be required to pay this license tax until after he has practiced his profession for two years in this state or elsewhere. An engineer who is an employee of the state or of any county or municipality at a fixed salary and who engages in no other engineering work for compensation is not subject to this license tax when so employed. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 522.)

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### § 40-12-100. Fertilizer factories.

Each person owning or operating any fertilizer factory shall pay a license tax as follows: in which the capital invested does not exceed $25,000, $50; in which the capital invested exceeds $25,000 and does not exceed $50,000, $100; in which the capital invested exceeds $50,000 and does not exceed $100,000, $200; in which the capital invested exceeds $100,000, $250 for each factory. Each fertilizer mixing plant shall pay a license tax of $15. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 524.)

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### § 40-12-101. Fire, closing out, etc., sales.

Each person, other than the original bona fide owners, selling goods, wares, or merchandise as an insurance, bankruptcy, mortgage, insolvent, assignee's, executor's, administrator's, receiver's, trustee's, removal, or

closing out sale, or a sale of goods, wares, and merchandise damages by fire, smoke, water, or otherwise, shall pay license tax of $100. The provisions of this section shall not apply to sheriffs, constables, or other public or court officers or to any other persons acting under the license, discretion, or authority of any court, state or federal, selling goods, wares, or merchandise in the course of their official duties. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 525.)

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**§ 40-12-124. Manicurists, hairdressers, etc.**

Each person engaging in the business of manicuring, hairdressing or administering facial treatments shall pay a license tax of $5; provided, that this section shall not apply to such persons employed in beauty shops and beauty shop colleges, paying the license tax as provided under Section 40-12-61. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 549.)

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**§ 40-12-125. Mattresses, cushions, pillows, etc.**

Each person engaging in the business of manufacturing or upholstering cushions, mattresses, pillows, or rugs, or the renovating, cleaning or reworking of same, shall pay for the privilege of engaging in such business, $15;



provided that the license tax shall be $5 in towns of 3,000 or less population. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 551.)

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**§ 40-12-126. Medicine, chemistry, bacteriology, etc.**

Each person engaged in the practice of medicine, chemistry, bacteriology, roentgenology, or other similar profession, except chemists, bacteriologists, and roentgenologists employed full time by physicians, non-profit scientific institutions, and hospitals, and except doctors employed exclusively by a medical college, shall pay the following annual license tax: in cities or towns of over 5,000 inhabitants, $25; 1,000 to 5,000 inhabitants, $10; all other places, whether incorporated or not, $5, but no license tax shall be paid to the county. If such business is conducted as a firm or as a corporation in which more than one person is engaged, each person so engaged shall pay the license tax as above stated. The license tax imposed by this section shall not apply until such person shall have practiced his or her profession as long as two years. Two fifths of the annual license tax herein levied shall remain in the treasury and shall constitute a separate fund to be disbursed by the treasurer as follows: All of such fund arising from licenses paid in each of the separate counties of the state shall be set aside in a separate fund for such county and shall be disbursed by the treasurer, on the order of the board of censors of the

medical society of such county, if there is such organization in such county. (Acts 1935, No. 194, p. 256; Acts 1936-37, Ex. Sess., No. 181, p. 210; Code 1940, T. 51, § 552; Acts 1957, No. 379, p. 508.)

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**§ 40-12-161. Spectacles or eyeglasses.**

Each person selling spectacles or eyeglasses, other than nonprescription sunglasses, shall pay the following license tax: in cities or towns of 50,000 inhabitants and over, $25; in cities or towns of 15,000 inhabitants and less than 50,000 inhabitants, $15; in cities and towns of over 5,000 inhabitants and less than 15,000 inhabitants, $10; and in all other places, whether incorporated or not, $5. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 594.)

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**§ 40-12-162. Stock and bond brokers.**

Each person dealing in stocks and bonds shall pay a license tax of $50. The payment of the license tax required by this section shall authorize the doing of business in the town, city or county where paid. (Acts 1935, No. 194, p. 256; Code 1940, T. 51, § 596.)

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**§ 40-12-163. Street fairs and carnivals.**

Each person operating or conducting an exhibition termed a "street fair" or "carnival" shall pay to the state a license tax as follows: for an exhibition operating or composed of or controlling or embracing not more than 10 exhibits, devices or concessions, $50; but where more than 10 and not exceeding 20 exhibits, devices or concessions, $75; and where more than 20 and not exceeding 35, $100; and where more than 35 exhibits, devices or concessions, $150. This license shall entitle the street fair or carnival to be operated for a period of not exceeding two weeks in any one place at any one time. For the purpose of this section a "street fair" or "carnival" shall mean a combination of exhibitions, also called sideshows, rides, games of chance, tests of skill or strength, concessions and any other devices generally associated with a "street fair" or "carnival," regardless of ownership, when operated as a combination or a group, and regardless of whether or not an admission is charged to the midway or grounds. A licensee under this section shall not be required to purchase licenses under the provisions of Sections 40-12-69, 40-12-95, 40-12-103, 40-12-140, 40-12-153 and 40-12-157. (Acts 1935, No. 194, p. 256; Acts 1939, No. 391, p. 515; Code 1940, T. 51, § 597; Acts 1967, No. 422, p. 1088.)

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**In the Supreme Court of the United States**

OCTOBER TERM, 1996

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No. 96-896

JEFFERSON COUNTY, ALABAMA, PETITIONER

*v.*

WILLIAM ACKER AND U.W. CLEMON

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

## OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. 1-56) is reported at 92 F.3d 1561. The panel opinion of the court of appeals is reported at 61 F.3d 848. The opinion of the district court (Pet. Supp. App. 1-35) is reported at 850 F. Supp. 1536.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable provisions of Articles III and VI of the Constitution of the United States, of 4 U.S.C. 106, 110-111,



and of the Jefferson County, Alabama, occupational tax (Ordinance No. 1120, Sept. 29, 1987), are set forth at Pet. App. 57-114.

## STATEMENT

1. In 1967, the State of Alabama authorized its counties to impose "a license or privilege tax upon any person" who engages in a business or profession within the county and who is not required by any other law to pay such a tax to the county or the State (1967 Ala. Acts No. 406, § 4; Pet. App. 66-68; see Pet. Supp. App. 31). Pursuant to this authority, the Jefferson County Commission enacted the "Occupational Tax of Jefferson County, Alabama" in 1987 (Jeff. Cty. Ord. 1120 (Sept. 29, 1987); Pet. App. 69; see Pet. Supp. App. 31). Section 2 of this Ordinance states that it (Pet. App. 72):

> shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession * * * within the County * * * without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

The term "gross receipts" is defined by the Ordinance to include (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71):

> the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given

> credit for by his employer for any work done or personal services rendered * * * .

The term "gross receipts" does not include any compensation earned outside Jefferson County (Jeff. Cty. Ord. 1120, § 3; Pet. App. 72-73).

Jefferson County ordinarily collects its "occupational" tax from employers, who withhold the tax from employee wages. In the absence of withholding, however, employees are to remit the taxes directly to the County (Jeff. Cty. Ord. 1120, §§ 4, 5; Pet. App. 73-75). Persons who fail to comply with the Ordinance are subject to interest and penalties on the unpaid balance of the taxes (Jeff. Cty. Ord. 1120, § 10; Pet. App. 77-78). There are no criminal penalties for failing to pay the county's "occupational" tax (Pet. App. 26).

2. Respondents are federal district judges for the Northern District of Alabama. Most, but not all, of their duties as federal judges are performed at the federal courthouse located in Jefferson County. Pet. Supp. App. 32-33.

The State of Alabama has not directly imposed a "privilege, license or occupational" tax on the employment conducted by respondents. Pet. Supp. App. 33. The Jefferson County ordinance therefore applies to respondents and obligates them to pay an "occupational" tax of one-half of one percent of their "gross receipts" from the services they perform within the County (Jeff. Cty. Ord. 1120, § 2; Pet. App. 72). The Administrative Office of the United States Courts has not withheld the county taxes from respondents' wages (Pet. Sup. App. 33), and respondents have not paid the taxes directly (*Id.* at 34).



3. a. The County brought suit against respondents in the state district court of Jefferson County to collect the unpaid taxes (Pet. Supp. App. 1). Relying upon 28 U.S.C. 1442, respondents removed the action to the United States District Court for the Northern District of Alabama. That statute authorizes the removal to federal court of any civil or criminal proceeding commenced in a state court against "[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties" (28 U.S.C. 1442(a)(3)).

b. On cross motions for summary judgment, the district court held the county "occupational" tax to be unconstitutional as applied to federal judges (Pet. Supp. App. 1-31). The court reasoned that, even though the tax was calculated by reference to the income earned by respondents and was not imposed on the United States, the tax directly interfered with the operations of the federal judiciary and therefore violated the "intergovernmental tax immunity doctrine" derived from the Supremacy Clause of Article VI of the Constitution (Pet. Supp. App. 10-22). The court further concluded that application of the county tax to respondents would effect a reduction in their compensation in violation of the Compensation Clause of Article III of the Constitution (Pet. Supp. App. 24-30).

4. A panel of the court of appeals reversed. 61 F.3d 848 (1995). The panel noted that the county tax (i) applies to all forms of employment and does not discriminate against federal judges (*id.* at 852-853) and (ii) is not imposed on the federal government directly (*id.* at 853-856). The panel concluded that the county tax is constitutional because, both in operation and effect, it

merely taxes the income that respondents derive from employment (*id.* at 855):

> [O]nly if a federal employee is compensated [does] he or she become[ ] liable to Jefferson County for the occupational tax. A federal employee in Jefferson County could refuse to pay any license fees and still lawfully perform his or her federal duties under the ordinance *so long as that employee received no income from performing those duties.* Consequently, the occupational tax is not a *precondition* to the performance of any federal government functions but a *consequence* of receiving any compensation therefor.

Because the county has simply imposed a nondiscriminatory "income tax" on respondents (*id.* at 856), the panel concluded that the tax does not violate the intergovernmental tax immunity doctrine and does not unconstitutionally diminish respondents' compensation (*id.* at 856-857).

5. a. On rehearing *en banc*, the court of appeals vacated the panel decision and affirmed the district court (Pet. App. 1-36), with three judges dissenting (*id.* at 37-49). The court of appeals acknowledged that, under this Court's decision in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939), if the county tax were merely an "income tax" on federal employees, it would not violate the doctrine of intergovernmental tax immunity (Pet. App. 19). The court further recognized that it is a question of federal law whether the county tax is, in substance, an "income tax" for this purpose. The court nonetheless concluded that it would look to state law to



determine "the attributes comprising the substance" of the county tax (*ibid.*).

The court noted that, in *McPheeter v. City of Auburn*, 259 So. 2d 8333 (1972), the Alabama Supreme Court stated that a local occupational tax constitutes a license or "privilege" tax – rather than an income tax – under state law (Pet. App. 19-20). Based upon the theory that the county tax is imposed on the "privilege" of performing the federal judicial function, rather than on the "income" of federal judges, the court of appeals held that the tax violates the doctrine of intergovernmental tax immunity (*id.* at 20-22):

> The privilege tax differs fundamentally from an income tax. The ordinance purports to make it unlawful to engage in one's occupation in Jefferson County without paying the privilege tax. Ordinance No. 1120, § 2. This provision indicates that, instead of taxing the receipt of income, the privilege tax attaches to the performance of work in Jefferson County.

Although the court acknowledged that the "legal incidence" of the county tax falls on respondents as individuals, the court concluded that the actual incidence of the tax is on the "privilege" of performing judicial duties (*id.* at 22-23). The court stated that federal judges are "federal instrumentalities" in their performance of judicial duties and that the county tax thus "amounts to a direct tax on federal instrumentalities in violation of the intergovernmental tax immunity doctrine" (*id.* at 25).

b. The court of appeals then considered whether Congress has consented to the imposition of such taxes. The court held that the Public Salary Tax Act – in which

Congress consented to taxation of the "pay or compensation" of federal officers or employees (4 U.S.C. 111) – does not consent to imposition of a "privilege" tax on federal judges (Pet. App. 29-31). The court distinguished *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (1985), in which the Third Circuit held that a local "privilege" tax was, in substance, an "income tax" that could be imposed under the Public Salary Tax Act on the official transcript fees received by a federal court reporter (Pet. App. 31 n.19). The court of appeals stated, without elaboration, that the ordinance involved in *City of Pittsburgh* "did not include the factors" that made the Jefferson County ordinance a "privilege" tax (*ibid.*).

The court of appeals also held that the Buck Act does not consent to the imposition of a "privilege" tax on federal judges (Pet. App. 32-36). That statute provides that "[n]o person" is to be relieved of liability for a state or local "income tax * * * by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area" (4 U.S.C. 106(a)). The statute defines the term "income tax" to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c). The court of appeals acknowledged that the county tax was "within the Buck Act's definition of an 'income tax' " (Pet. App. 33). The court stated, however, that the Jefferson County tax on the "privilege" of working as a federal judge is a direct tax on "the United States or an[ ] instrumentality thereof" (4 U.S.C. 107(a)) and is therefore prohibited by the express terms of the Act (Pet. App. 33).



In reaching this conclusion, the court of appeals sought to distinguish this Court's decision in *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953). In *Howard*, the Court held that the Buck Act authorized application of a Louisville tax on the "privilege" of conducting business to persons who were employed at a naval ordnance plant located within the city. *Id.* at 627-629. The court of appeals stated that the sole question in *Howard* was whether "Louisville lacked jurisdiction to tax in a federal area" (Pet. App. 35). By contrast, the court stated, the issue in this case is whether the local tax is a direct tax on a federal instrumentality that violates the intergovernmental immunity of the United States (*ibid.*). The court stated that the fact "that *Howard* upheld the application of the Louisville license fee to federal employees does not imply that the Buck Act precludes an intergovernmental tax immunity challenge to the application of Ordinance No. 1120 to federal judges" (*id.* at 36). The court explained that (*ibid.*):

> Unlike federal judges, employees of a naval ordnance plant realistically can be viewed as separate entities from the federal government when performing their duties * * * .

c. Because the court of appeals concluded that the challenged tax violated the intergovernmental tax immunity of the United States, and was not authorized by the Public Salary Tax Act or the Buck Act, the court stated that it was unnecessary to address whether the tax also violated the Compensation Clause of Article III of the Constitution (Pet. App. 10).

## DISCUSSION

The court of appeals erred in concluding that the county tax is unconstitutional as applied to federal judges. Congress has consented to the imposition of state and local taxes assessed upon the "pay or compensation" received by federal officers and employees. 4 U.S.C. 111. The fact that such a tax may be labelled a "privilege" tax under state law does not vitiate that consent. Review by this Court is warranted both by the importance of the question presented and because the decision in this case conflicts with the reasoning and conclusion of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985).

1. Neither the parties nor the courts below addressed whether this state court tax collection suit was properly removed to federal court. 28 U.S.C. 1442(a)(3) authorizes the removal to federal district court of any "civil action * * * commenced in a State court" against "[a]ny officer of the courts of the United States, for *any act under color of office or in the performance of his duties*" (*ibid.*; emphasis added). The statute permits a federal judge to remove a case commenced against him in state court if a federal defense is pleaded to the state claim (*Mesa v. California*, 489 U.S. 121, 136 (1989)) and if the state claim is "for any act under color of office or in the performance of his duties" (28 U.S.C. 1442(a)(3)). The first of these two requirements is plainly met in this case. The second, however, is not clearly established, for the courts below have not addressed whether the state court action was commenced against respondents "for any act under



color of office or in the performance of [their] duties" (*ibid.*).[1]

Because the parties did not address this question in the courts below, it is unclear what contentions they would raise. If the petition for a writ of certiorari is granted, the Court may wish to direct the parties to address this jurisdictional question in their briefs on the merits of the case.[2]

2. The court of appeals erred in concluding that Congress has not consented to the challenged county tax.[3] The Public Salary Tax Act unequivocally provides

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[1] Although the county tax is calculated upon the *income* that respondents receive for the performance of their duties, it is not clear that respondents' refusal to pay the tax was an act under color of office or in the performance of duty.

[2] "If at any time before final judgment [in a case removed to federal court] it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. 1447(c).

[3] The court of appeals did not consider whether congress has consented to the tax under the Public Salary Tax Act (4 U.S.C. 111) or the Buck Act (4 U.S.C. 105 *et seq.*) until *after* the court had concluded that the tax violated the constitutional doctrine of intergovernmental tax immunity. As this Court has frequently observed, however, a constitutional issue should be reached only after non-constitutional bases for decision have been resolved. *Califano v. Yamasaki*, 442 U.S. 682, 692-693 (1979); *Bowen v. United States*, 422 U.S. 916, 920 (1975); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960). This practice is rooted in the Court's reluctance to decide "abstract, hypothetical or contingent" constitutional questions. *Thorpe v. Housing Authority*, 393 U.S. 268, 284 (1969). It is appropriate first to address whether Congress has consented to the challenged tax because, if such consent has been given, it is irrelevant whether,

that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. The history and the text of this provision reflect that a nondiscriminatory local tax imposed on compensation from employment may be applied to any "officer or employee of the United States" (*ibid.*) without regard to whether that tax is labelled, under state law, as an "occupation" tax, a "privilege" tax, or an "income" tax.

a. The Public Salary Tax Act is intimately connected with the modern development of the inter-governmental tax immunity doctrine. See *Davis v. Michigan Department of the Treasury*, 489 U.S. 803, 811-812 (1989). Under this doctrine, "States may not impose taxes directly on the Federal Government, nor may they impose taxes the legal incidence of which falls on the Federal Government." *United States v. County of Fresno*, 429 U.S. 452, 459 (1977) (footnote omitted). For many years, the intergovernmental tax immunity doctrine was broadly applied to prohibit state taxation of the salaries of officers and employees of the United States (*Dobbins v. Commissioners*, 41 U.S. (16 Pet.) 435 (1842)) and to prohibit federal taxation of the salaries of state officials (*Collector v. Day*, 78 U.S. (11 Wall.) 113 (1870)). See *Davis v. Michigan Department of the Treasury*, 489 U.S. at 810-812. In *Helvering v. Gerhardt*, 304 U.S. 405 (1938), however, the Court declined to follow

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in the absence of such consent, the tax would be unconstitutional.



these authorities – and implicitly overruled *Collector v. Day* – by holding that the federal income tax could validly be imposed on employees of the New York Port Authority. One year later, in *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939), the Court overruled the entire line of cases from *Dobbins v. Commissioner* through *Collector v. Day*. As this Court explained in *Davis v. Michigan Department of the Treasury*, 489 U.S. at 811:

> After *Graves*, * * * intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

The Public Salary Tax Act was considered by Congress during the period when the Court was in the process of narrowing, and ultimately abandoning, the *Dobbins-Day* line of cases. After the Court held in 1938 in *Helvering v. Gerhardt, supra*, that the federal government could impose nondiscriminatory taxes on state employees, Congress determined that federal officers and employees should be subject to similar state taxes. In the Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575, the predecessor to 4 U.S.C. 111, Congress therefore expressly consented to nondiscriminatory state taxation of the "pay or compensation" of federal officers and employees. See H.R. Rep. No. 26, 76th Cong., 1st Sess. (1939); S. Rep. No. 112, 76th Cong., 1st Sess. (1939).

Shortly before the Public Salary Tax Act was enacted, however, this Court entered its decision in *Graves v. New York ex rel. O'Keefe, supra*. The practical effect of the Public Salary Tax Act was thus to codify the intervening result

in *Graves* and thereby foreclose "the possibility that subsequent judicial reconsideration of [*Graves*] might reestablish the broader interpretation of the immunity doctrine." *Davis v. Michigan Department of the Treasury*, 489 U.S. at 812. The purpose of the Act is thus plainly to abandon, not preserve or extend, the immunity of federal officers and employees from nondiscriminatory state taxation.

b. The proper interpretation of the Public Salary Tax Act must, of course, begin with its language. See, *e.g.*, *Bailey v. United States*, 116 S. Ct. 501, 506 (1995). Under this Act, the United States consents to nondiscriminatory state or local taxation of the "pay or compensation for personal service" received by any "officer or employee of the United States" (4 U.S.C. 111). Because the local ordinance challenged in this case taxes the "pay of compensation" that respondents receive for the "personal service" they provide as officers of the United States, and does not discriminate in doing so, the tax comes within the plain language of the consent that Congress has given to state and local taxation.[4]

The language of the county ordinance, of course, does more than simply impose the tax. It also states that it is "unlawful for any person" to be employed within the

[4] The district court (Pet. Supp. App. 8-9) correctly held that the county tax does not "discriminate against the officer or employee because of the source of the pay or compensation" (4 U.S.C. 111). The *en banc* court of appeals stated that, "[o]n this appeal, there is no contention that this holding was erroneous and, in light of our disposition of the case, we do not address it" (Pet. App. 9 n.9).



County "without paying" the tax (Jeff. Cty. Ord. 1120, § 2; Pet. App. 72).[5] The court of appeals held that the tax is beyond the scope of the statutory consent because, (i) under state law, the ordinance imposes a tax on the "privilege" of working, rather than a tax on the "income" received from work (Pet. App. 29-31; see *id.* at 19-20, citing *McPheeter v. City of Auburn*, 259 So. 2d 833 (Ala. 1972)) and (ii) a tax imposed on the "privilege" of working as a federal judge constitutes a direct tax on the United States to which Congress has not consented (Pet. App. 31).

The court of appeals erred, however, in looking to the label, rather than the substance, of the challenged tax. Whether the County's occupational tax is imposed on "pay or compensation" within the scope of the consent granted by the Public Salary Tax Act (4 U.S.C. 111) is a question of federal law. See *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624, 628-629 (1953); *United States v. City of Pittsburgh*, 757 F.2d 43, 47 (3d Cir. 1985). This Court has emphasized that, in determining the validity of a state tax whose burden falls upon the federal government or its employees, "we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932). It is therefore necessary to "look through form and behind labels to

[5] The tax is imposed on the "gross receipts" from employment within the County. That term is defined to mean "compensation" and includes "the total gross amount of all salaries, wages, commissions, bonuses or any other money payment of any kind" (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71).

substance" (*City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 492 (1958)) and to go beyond the "bare face of the taxing statute to consider all relevant circumstances" (*United States v. City of Detroit*, 355 U.S. 466, 469 (1958)). See also *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977) (the constitutionality of a state tax on the "privilege of doing business" under the Commerce Clause does not turn merely on the legislative phrasing, for such "formalism merely obscures the question whether the tax produces a forbidden effect").

In its "practical operation" and effect, the county tax is simply a tax on the "pay or compensation" that respondents receive for their services to the United States and is therefore within the consent provided by 4 U.S.C. 111. The tax is imposed only if a person earns "gross receipts" or receives "compensation" in the form of "salaries, wages, commissions, [or] bonuses" while employed within the County (Jeff. Cty. Ord. 1120, § 1(F); Pet. App. 71). See note 5, *supra*. Even though phrased as a "privilege" tax, it is imposed only on income as it is received. The tax does not operate as a prerequisite or precondition of employment; it is therefore indistinguishable in its practical operation and effect from other forms of income taxation.

The court of appeals was unduly swayed by the language of the ordinance that makes it "unlawful" for a person not to pay this "occupational" tax (Pet. App. 26-27). It is, by definition, "unlawful" for any person to fail to pay a tax imposed by law. If a State could not make it "unlawful" for a federal officer to fail to pay a tax, the tax could not be enforced; if the tax could not be



enforced, it would then hardly be relevant whether Congress had, or had not, consented to it.

The only "punishment" imposed for a failure to pay the county tax is interest and penalties on the unpaid tax (Jeff. Cty. Ord. 1120, § 10; Pet. App. 77). The fact that Ordinance 1120, in this manner, makes it "unlawful" for anyone to fail to pay the tax does not take the tax outside the scope of the statutory consent. The tax does not discriminate against federal officers and employees; it is imposed on the "pay or compensation" that they receive from their employment (4 U.S.C. 111); it is therefore within the scope of the statutory consent.

c. The decision in this case conflicts with the decision of the Third Circuit in *United States v. City of Pittsburgh*, 757 F.2d 43 (1985). In that case, the City of Pittsburgh imposed a "business privilege tax" on persons doing business in the city at the rate of five mills per dollar of gross receipts. The United States challenged the application of this "privilege" tax to the official transcript fees of a federal court reporter in the United States District Court for the Western District of Pennsylvania. The Third Circuit concluded, however, that the local "privilege" tax was within the scope of the consent provided by the Public Salary Tax Act, 4 U.S.C. 111. In so holding, the court of appeals disregarded the fact that the Pennsylvania Supreme Court had ruled that the local tax was a "privilege" tax rather than an "income tax" under state law. 757 F.2d at 47. The court of appeals held that federal law, not state law, determines whether the local tax is imposed on the "pay or compensation" (4 U.S.C. 111) of a federal officer. 757 F.2d at 47. The court explained that, in enacting the Public Salary Tax Act, Congress intended

that federal employees "should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations." *Ibid.*, quoting S. Rep. No. 112, *supra*, at 4. The court stated that the statutory consent to the taxation of the "pay or compensation" of federal officers must be read broadly to comport with that legislative intent. *Ibid.* The court further noted that, in enacting the Public Salary Tax Act, Congress was aware "that the states used a variety of forms of income taxes, including gross income taxes and occupational taxes." *Ibid.*, citing S. Rep. No. 112, *supra*, at 6-10. Because the "business privilege tax" challenged in *City of Pittsburgh* was imposed on the "gross receipts or gross income from the [transcript] fees," the court concluded that Congress consented to the imposition of the tax under 4 U.S.C. 111. 757 F.2d at 47.

d. The Buck Act, 4 U.S.C. 105 *et seq.*, reinforces this understanding of the scope of the consent to state taxation contained in the Public Salary Tax Act. Under the Buck Act, a person who receives "income from transactions occurring or services performed" in a "Federal area" is subject to "any income tax" levied by a state or local government "to the same extent" as if the income was received in an area that is "not a Federal area." 4 U.S.C. 106(a).[6] The term "income tax" is defined for this

[6] The term "Federal area" is defined broadly in the Buck Act to mean "any lands or premises held or acquired by or for the use of the United States" (4 U.S.C. 110(e)). This definition appears, by its terms, to encompass premises used by the United States for the purposes of operating a federal courthouse. The origin and purpose of the Buck Act, however,



purpose to mean "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 U.S.C. 110(c).

The Buck Act (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059) and the Public Salary Tax Act (Act of Apr. 12, 1939, ch. 54, § 4, 53 Stat. 575) were both enacted by the same Congress. In adopting the broad definition of the term "income tax" contained in the Buck Act, Congress was aware that States impose a variety of taxes on income that are designated by terms other than "income tax" – such as "corporate-franchise" taxes or "business-privilege" taxes. S. Rep. No. 1625, *supra*, at 5. Congress sought to ensure that state and local governments are authorized to impose taxes measured by the income or receipts from federal employment regardless of how the tax was labelled or described. *Ibid.*

In *Howard v. Commissioners of the Sinking Fund*, 344 U.S. 624 (1953), this Court held that the Buck Act consented to the imposition of a municipal "license fee" (of one percent of the wages and "other compensations

was more limited: the statute was designed to ensure that federal offers and employees who reside or work within exclusive federal enclaves would be treated equally with those who reside and work outside such areas. See S. Rep. No. 1625, 76th Cong., 3d Sess. 3 (1940); *United States v. Lewisburg Area School Dist.*, 539 F.2d 301, 309 (3d Cir. 1976). Because the Public Salary Tax Act broadly consents to any tax imposed on the "pay or compensation" of federal employees (4 U.S.C. 111), it is unnecessary to decide whether the Buck Act itself authorizes application of state and local "income taxes" to the salaries of federal judges as compensation for "services performed" in a "Federal area."

earned by every person in the City") on employees who worked at a federal ordnance plant. *Id.* at 625 n.2. The employees had claimed in *Howard* that the local "license fee" was not an "income tax" within the scope of the Buck Act because the Kentucky Court of Appeals had held that "this tax was not an 'income tax' within the meaning of the Constitution of Kentucky but was a tax upon the privilege of working within the City" (*id.* at 628, citing *City of Louisville v. Sebree*, 214 S.W.2d 248, 253-254 (1948)). This Court rejected that argument (344 U.S. at 628-629):

> [T]he right to tax earnings within the area was not given Kentucky in accordance with the Kentucky law as to what is an income tax. The grant was given within the definition of the Buck Act, and this was for *any tax* measured by net income, gross income, or gross receipts.

In dissent in *Howard*, Justice Douglas (joined by Justice Black) urged a contrary point of view that is echoed in the reasoning of the court of appeals in the present case (*Id.* at 629 (citation omitted)):

> I have not been able to follow the argument that this tax is an "income tax" within the meaning of the Buck Act. It is by its terms a "license fee" levied on "the privilege" of engaging in certain activities. The tax is narrowly confined to salaries, wages, commissions and to the net profits of businesses, professions, and occupations. Many kinds of income are excluded, *e.g.*, dividends, interest, capital gains. The exclusions emphasize that the tax is on the *privilege* of working or doing business in Louisville. That is the kind of a tax the Kentucky Court of Appeals held it to be. The Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States.



The decision of the court of appeals in this case errs for the same reasons that the Court rejected the formalistic interpretation of the statute proposed by the dissent in *Howard*. Both in substance and practical effect, the county ordinance challenged in this case imposes a tax on income received from federal employment, and nothing more. Congress expressly consented to the imposition of such nondiscriminatory state and local taxes upon the "pay or compensation" of federal officers and employees. 4 U.S.C. 111.

3. The decision of the court of appeals holds a county ordinance unconstitutional and, in doing so, conflicts with the decision of another circuit with respect to a sensitive matter of federal-state relations. Review by this Court is therefore warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted. In addition to the question presented in the petition, the Court may wish to direct the parties to address whether this case is within the removal jurisdiction of the federal courts under 28 U.S.C. 1442(a)(3).

Respectfully submitted.

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